Office - Supreme Court, U.S.
FILED
AUG 9 1982
ALEXANDER L. STEVAS
CLERK

No. 82-222

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

1616 REMINC LIMITED PARTNERSHIP,
Petitioner,

v.

UNITED STATES ELEVATOR CORPORATION,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF AND APPENDIX FOR PETITIONER

STEPHEN N. SHULMAN
MARK C. ELLENBERG
CADWALADER, WICKERSHAM & TAFT
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 293-6300
Counsel for Petitioner

Of Counsel:
JAMES A. NEWELL
HOLYWELL CORPORATION
1300 N. 17th Street
Suite 500
Arlington, VA. 22209

PANDICK PRESS, WASHINGTON—1801 N. OAK STREET, ARLINGTON, VA 22209—(703) 522-6000

QUESTIONS PRESENTED

1. In a proceeding under the Bankruptcy Act of 1898, is United States Bankruptcy Rule 810 unconstitutional to the extent that it precludes de novo review by an Article III judge of a common law contract claim against the debtor?

2. Can oral testimony concerning a damaging admission render harmless the bankruptcy referee's improper exclusion from evidence of the document in which the admission originally appeared?

3. Is the assignee of a right of recovery against a contracting party affirmatively liable to that party for an obligation of the assignor where the assignment expressly did not include any of the assignor's obligations?

4. May a party recover a general unsecured claim against a bankruptcy debtor where the claim against the debtor did not arise until after the debtor filed a petition in the United States Bankruptcy Court and where the claim does not relate to a post-bankruptcy extension of credit?

PARTIES

Petitioner 1616 Reminc Limited Partnership is a limited partnership organized under the laws of Virginia. The general partners are Theodore B. Gould, an individual and Washington Properties, Inc., a Michigan Corporation. Respondent is United States Elevator Corporation.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISION AND RULE INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR ALLOWING THE WRIT	5
1. IN HOLDING THAT BANKRUPTCY RULE 810, PRECLUDING DE NOVO REVIEW BY AN ARTICLE III JUDGE, IS CONSTITUTIONAL WHEN APPLIED TO A COMMON LAW CONTRACT CLAIM AGAINST A DEBTOR IN A PROCEEDING UNDER THE BANKRUPTCY ACT OF 1898, THE COURT OF APPEALS DECIDED AN IMPORTANT QUESTION OF LAW, NOT YET DECIDED BY THIS COURT, IN A WAY THAT CONFLICTS WITH THE COURT'S DECISION IN *NORTHERN PIPELINE CONSTRUCTION CO. V. MARATHON PIPE LINE CO*	5
2. THE COURT OF APPEALS' HOLDING THAT ORAL TESTIMONY RENDERS HARMLESS THE ERRONEOUS EXCLUSION OF A DOCUMENT IS IN CONFLICT WITH THIS COURT'S DECISION IN *GORDON V. UNITED STATES* AND CALLS FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION	8
3. THE COURT OF APPEALS' HOLDING THAT AN ASSIGNEE OF A CONTRACT RIGHT BECOMES AFFIRMATIVELY LIABLE FOR CONTRACT OBLIGATIONS IS SO CLEARLY WRONG AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION	10

Page

4. THE COURT OF APPEALS' HOLDING THAT USE COULD BECOME A GENERAL CREDITOR OF REMINC AFTER REMINC PETITIONED FOR BANKRUPTCY IS IN CONFLICT WITH THIS COURT'S DECISION IN *UNITED STATES V. MARXEN* 12

CONCLUSION 14

APPENDIX 1a

TABLE OF AUTHORITIES

	Page
CASES	
Acme Harvester Co. v. Beekman Lumber Co., 222 U.S. 300 (1911)	12
Chatham Pharmaceuticals Inc. v. Angier Chemical Co., 347 Mass. 208, 196 N.E.2d 852 (1964)	10
Coleman v. Pearman, 159 Va. 72, 165 S.E. 371 (1932)	13
Continental Motors Corp. v. Morris, 169 F.2d 315 (10th Cir. 1948)	12
Daniels v. Parker, 209 Or. 419, 306 P.2d 735 (1957)	11
Ebling Brewing Co. v. Cereal Products Co., 6 F.2d 984 (2d Cir. 1925)	10
Everett v. Judson, 228 U.S. 474 (1913)	12
Falkenstern v. Herman Kussy Co., 137 N.J.L. 200, 59 A.2d 372 (Ct. of Errors & Appeals 1948)	10
Fiberchem, Inc. v. General Plastics Corp., 495 F.2d 737 (9th Cir. 1974)	12
Gordon v. United States, 344 U.S. 414 (1953)	8,9
In re C.H. Earle, Inc., 2 F. Supp. 15 (E.D.N.Y. 1932), *aff'd*, 65 F.2d 1013 (2d Cir.), *cert. denied sub nom. Globe Indemnity Co. v. C.H. Earle, Inc.*, 290 U.S. 674 (1933)	12
In re Hayes, 127 F. Supp. 514 (D. Alaska 1955)	13
Keyes v. Scharer, 14 Mich. App. 68, 165 N.W.2d 498 (Ct. App. 1968)	10
Northern Pipeline Construction Co. v. Marathon Pipe Line Co., ____ U.S. ____, 50 U.S.L.W. 4892 (U.S. June 28, 1982)	6,7,8,14
Shepard v. Commercial Credit Corp., 123 Vt. 106, 183 A.2d 525 (1962)	11
United States v. Marxen, 307 U.S. 200 (1939)	12,13

	Page
United States v. Raddatz, 447 U.S. 667 (1980)	7
United States ex rel. White v. Thompson & Georgeson, Inc., 346 F.2d 865 (9th Cir. 1965)	10
Urban v. Phy, 24 F.2d 494 (9th Cir. 1928)	10
White v. Stump, 266 U.S. 310 (1924)	12
CONSTITUTION	
United States Constitution, Article III	2,7
STATUTES AND RULES	
Bankruptcy Reform Act of 1978	6,7
Code of Virginia	
§ 43-7 (1981)	13
Federal Rules of Bankruptcy	
Rule 810	2,6,7,8
Rule 917	8
Federal Rules of Evidence	
Rule 801(d)(2)(D)	8
Rule 803(5), (6)	8
Rule 1002, 1004	9
U.S. Bankruptcy Act	
11 U.S.C. §§ 11(a)(1976)(repealed)	6,7
11 U.S.C. §§ 29, 32 (1976) (repealed)	6
TREATISES AND ARTICLES	
Administrative Office of the United States Courts, *Federal Judicial Workload Statistics for the Twelve Month Period Ended March 31, 1982*	6
4 A. Corbin, *Contracts* (1951)	11
G. Grismore, *Principles of the Law of Contracts* (rev. ed. 1965)	11
Restatement (Second) of Contracts (1981)	11,12
S. Williston, *A Treatise on the Law of Contracts* (3d ed. 1960)	11,12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No.

1616 REMINC LIMITED PARTNERSHIP,
Petitioner,

v.

UNITED STATES ELEVATOR CORPORATION,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF AND APPENDIX FOR PETITIONER

OPINIONS BELOW

None of the opinions below has been reported. The memorandum opinion of the United States Bankruptcy Court appears in the Appendix at pages 7a-38a. The oral opinion of the United States District Court appears in the Appendix at pages 4a-5a. The unpublished opinion of the United States Court of Appeals appears in the Appendix at pages 1a-3a.

JURISDICTION

The judgment sought to be reviewed was entered by the United States Court of Appeals for the Fourth Circuit on June 10, 1982. Jurisdiction of this Court is invoked under section 1254(1) of Title 28, United States Code.

CONSTITUTIONAL PROVISION AND RULE INVOLVED

United States Constitution, Article III, Section 1:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

United States Bankruptcy Rule 810:

> Upon an appeal the district court may affirm, modify, or reverse a referee's judgment or order, or remand with instructions for further proceedings. The court shall accept the referee's findings of fact unless they are clearly erroneous, and shall give due regard to the opportunity of the referee to judge of the credibility of the witnesses.

STATEMENT OF THE CASE

This is a proceeding under the Bankruptcy Act of 1898 in which respondent United States Elevator Corporation ("USE") asserted a claim against the debtor, petitioner 1616 Reminc Limited Partnership ("Reminc"), for the balance due on a construction contract. Reminc, in turn, asserted a breach of contract counterclaim against USE.

USE had, on March 16, 1973, contracted with Citcon Corp. ("Citcon") to design, construct, and install an elevator system in the Xerox Building, located at 1616 North Fort Meyer Drive in Rosslyn, Virginia. Citcon was, at that time, the general contractor responsible for Xerox Building construction. The building owner was Reminc, a limited partnership. Memorandum Opinion, 1-2 (App. 8a).

On August 15, 1975, Reminc filed a petition initiating proceedings before the United States Bankruptcy Court. On May 19, 1976, the Bankruptcy Court approved pursuant to Chapter XII of the Bankruptcy Act a plan of arrangement. Under the plan, Reminc was to remain a debtor-in-possession and attempt to operate the Xerox Building as a profitable commercial venture. *Id.* (App. 7a-8a).

In accordance with the plan of arrangement, Reminc wound up its contractual relationship with Citcon. Reminc then had Citcon assign to it such rights of action for latent construction defects as Citcon may have had against its subcontractors. A single writing assigning to Reminc Citcon's rights of action against all Xerox Building subcontractors was executed on August 6, 1976. PX 10 (App. 55a).

The proceeding now before the Court began when USE filed an Amended Complaint asserting a claim against Reminc for the balance of payments due to USE under its subcontract with Citcon (App. 41a). The sole basis for liability alleged in the Amended Complaint was a mechanic's lien filed by USE against the Xerox Building. Reminc, alleging that USE did not perform its obligations under the subcontract, and that the elevator system required substantial remedial construction, counterclaimed for $1.500,000. (App. 45a).

The Bankruptcy Court ruled, on January 15, 1977, that a waiver of the mechnic's lien executed by USE was valid and binding. *See* Memorandum Opinion, 2 (App. 8a). This ruling was affirmed by the District Court. Rather than appeal the ruling further, USE abandoned the mechanic's lien and moved the Bankruptcy Court to recognize an unsecured claim against the debtor based exclusively on the assignment from Citcon to Reminc. (App. 52a). This unsecured claim and Reminc's counterclaim were the subject of a two-day trial held before the United States Bankruptcy Court on January 29 and 30, 1980.

Central to both the USE claim and the Reminc counterclaim was a single issue: whether USE installed the elevator system in accordance with contract specifications. The parties introduced severely conflicting testimony on this point. USE witnesses testified that the elevators operated within industry

standards. None of these witnesses admitted to observing any serious performance problems. Reminc, for its part, presented the testimony of a Xerox Corporation employee who, as facility manager for the prime tenant, monitored complaints about the elevators on a daily basis. Included among the numerous complaints he had logged were a constant bouncing motion of the elevators at landings, stops above or below floor level, failures to stop at floors selected by passengers, large passenger lines in the lobby, and occasional free falls of one or two floors. The same or similar phenomena were observed by the elevator adjusters who ultimately replaced USE personnel and by two experts hired by Reminc to devise a plan for correcting the system's deficiencies. Anchoring Reminc's case was a memorandum prepared by L. William ("Bill") Cork, the first elevator adjustor USE assigned to correct problems at the Xerox Building. DX NN (App. 56a). The Cork memorandum, dated October 13, 1975, not only confirmed, from the mouth of a USE employee, the same performance problems observed by Reminc's live witnesses, but it made clear precisely why these problems existed.

Cork's own words elegantly framed the stark reality of USE's failure:

> In conclusion, our most serious problem is still present. The loading car releveling makes the people afraid of the elevator. The car bouncing keeps this fear alive. The multiplex controller still has many problems. We have added many aspirins to relieve the pain, but we have not fixed the broken leg.

DX NN, 6 (App. 63a).

The Bankruptcy Court determined that USE substantially performed its contract obligations. In evaluating the parties' conflicting contentions about the elevators' performance, the Bankruptcy Court ruled that Cork's memorandum was inadmissible hearsay. It then found the USE evidence to be the more credible. The Bankruptcy Court ruled also that the assignment to Reminc of Citcon's choses in action against subcontractors rendered Reminc affirmatively liable to USE for the contract price. Finally, it ruled that USE could assert a

contract claim against Reminc even though the assignment on which the claim was predicated did not occur until after the filing of the bankruptcy petition. (App. 7a-38a).

The District Court affirmed in a brief oral opinion. Judge Bryan considered the Bankruptcy Court's ultimate findings of fact to be supported by "sufficient evidence" (App. 5a). The District Court held that the Cork memorandum was improperly excluded, but that the error was harmless. (App. 5a).

Reminc appealed to the United States Court of Appeals for the Fourth Circuit. The Court of Appeals also ruled that any error in excluding from evidence the Cork memorandum was harmless. This ruling was grounded on the fact that "[d]uring [Cork's] deposition counsel for Reminc was free to question Cork about the memorandum and did so in some detail."[1] (App. 2a-3a). With respect to the other issues briefed by Reminc, the Court of Appeals stated,

> Reminc also raises with us issues concerning (1) the assignment of liabilities by Citcon, (2) USE's status as a general creditor, (3) the sufficiency of the evidence to support a finding that USE performed its contract in a workmanlike manner and (4) the constitutionality of Bankruptcy Rule 810. A review of the record, the bankruptcy court's opinion and the district court's affirmance discloses that these issues are without merit. (App. 3a)

REASONS FOR ALLOWING THE WRIT

1. IN HOLDING THAT BANKRUPTCY RULE 810, PRECLUDING DE NOVO REVIEW BY AN ARTICLE III JUDGE, IS CONSTITUTIONAL WHEN APPLIED TO A COMMON LAW CONTRACT CLAIM AGAINST A DEBTOR IN A PROCEEDING UNDER THE BANKRUPTCY ACT OF 1898, THE COURT OF APPEALS

[1] At the time of trial, Cork was not employed by USE and lived in California. Reminc deposed Cork in California and offered the deposition in lieu of live testimony.

DECIDED AN IMPORTANT QUESTION OF LAW, NOT YET DECIDED BY THIS COURT, IN A WAY THAT CONFLICTS WITH THE COURT'S DECISION IN *NORTHERN PIPELINE CONSTRUCTION CO. V. MARATHON PIPE LINE CO.*

In *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, __U.S.__, 50 U.S.L.W. 4892 (U.S. June 28, 1982), which addressed the Bankruptcy Reform Act of 1978, the Court expressly left undecided the constitutional propriety of adjudications by Article I officers under the Bankruptcy Act of 1898. 50 U.S.L.W. at 4900 n.31. This question remains crucial to bankruptcy proceedings initiated prior to the effective date of the 1978 Act.[2] The importance of the question as a matter of constitutional law is manifest, and its prompt resolution by this Court would greatly enhance the orderly resolution of those proceedings which it affects. As of March 31, 1982, some 65,000 cases filed under the 1898 Act were still pending.[3]

The Court's opinions in *Northern Pipeline* lead inescapably to the conclusion that the "clearly erroneous" deference which Bankruptcy Rule 810 accords to findings by the Bankruptcy Court cannot pass constitutional muster where a common law contract claim within the exclusive federal jurisdiction established by the 1898 Act is at stake.[4] The fatal defects in this

---

[2] The Bankruptcy Reform Act of 1978 became effective on October 1, 1979. P.L. 95-598 § 402, 11 U.S.C. prec. § 101 note (Supp. III 1979). All cases commenced before that date are governed by the provisions of the old act for their duration. *Id.* § 403(a).

[3] Administrative Office of the United States Courts, *Federal Judicial Workload Statistics for the Twelve Month Period Ended March 31, 1982*, Table F-1 (1982).

[4] Under the Bankruptcy Act of 1898, all claims against a bankruptcy debtor's estate are within the jurisdiction of the Bankruptcy Court. § 2, 11 U.S.C. §§ 11(a)(2), (7), (12), (15) (1976) (repealed). Because bankruptcy proceedings stay all actions, including those in state courts, against the debtor and ultimately discharge all preexisting obligations of the debtor, the federal jurisdiction over claims against the debtor is exclusive. §§ 11, 14, 11 U.S.C. §§ 29, 32 (1976) (repealed). Claims by the debtor against third parties, other than counterclaims, come within the Bankruptcy Court's jurisdiction only if the third party consents. § 2, 11 U.S.C. § 11(a) (7) (1976) (repealed). Whether such claims may be adjudicated by a legislative court is not at issue here.

scheme are precisely identical to those inherent in the Bankruptcy Reform Act of 1978: the adjudication does not come within one of the three narrow situations in which Congress may create a legislative court, and the Bankruptcy Court does not function as a mere adjunct of the District Court.

Whatever the authority of Congress to create legislative courts, it plainly does not extend to the common law contract claim adjudicated in this case. The breach of contract claim USE asserted against Reminc arises wholly under state law, is subject to no federal rule of decision, is subject to the traditional common law mode of adjudication, and is before a federal court only because Reminc filed a bankruptcy petition. The claim, in short, is of the same type as that which the Court in *Northern Pipeline* found to be unsuitable for determination by an Article I tribunal. 50 U.S.L.W. at 4894, 4898 (Brennan, J); *id.* at 4903 (Rhenquist, J., concurring).

The Bankruptcy Court under the 1898 Act similarly is not an adjunct of the District Court, as long as Rule 810 precludes de novo review of its findings.[5] Rule 810, both by effect and by design, places the power of decision in the Bankruptcy Court. It limits Article III Courts to a strictly appellate role. This appellate supervision is inadequate to preserve the separation of legislative and judicial powers which the framers sought to accomplish through Article III. *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 50 U.S.L.W. at 4901-02 & n.39 (Brennan, J.); *id.* at 4903 (Rhenquist, J., concurring); *See United States v. Raddatz*, 447 U.S. 667, 682-84 (1980); *id.* at 707-12 (Marshall, J., dissenting). As stated by Mr. Justice Rhenquist in *Northern Pipeline*,

> I am likewise of the opinion that the extent of review by Art. III courts provided on appeal from a decision of the Bankruptcy Court in a case such as Northern's does not save the grant of authority to the latter under the rule espoused in *Crowell v. Benson*, 285

[5] The Bankruptcy Act of 1898 does not itself require that any deference be given to Bankruptcy Court findings. § 2(a), 11 U.S.C. § 11(a)(10) (1976) (repealed). Only Rule 810 precludes de novo review by the District Court.

> U.S. 22 (1932). All matters of fact and law in whatever domains of the law to which the parties' dispute may lead are to be resolved by the Bankruptcy Court in the first instance, with only traditional appellate review apparently contemplated by Art. III courts. Acting in this manner the Bankruptcy Court is not an "adjunct" of either the District Court or the Court of Appeals.

50 U.S.L.W. at 4903.

In light of the pronounced incompatibility of Rule 810 with the views expressed by the Court in *Northern Pipeline*, Reminc respectfully suggests that the Court not only grant the petition, but summarily vacate the judgment below and remand the case with directions for de novo proceedings in the District Court. If such action were taken, the additional questions raised in the petition would become moot.

2. THE COURT OF APPEALS' HOLDING THAT ORAL TESTIMONY RENDERS HARMLESS THE ERRONEOUS EXCLUSION OF A DOCUMENT IS IN CONFLICT WITH THIS COURT'S DECISION IN *GORDON V. UNITED STATES* AND CALLS FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION

There can be no serious doubt that the Bankruptcy Court erroneously excluded the Cork memorandum from evidence. Indeed, the memorandum was admissible on at least three grounds. First, and foremost, it was an admission of a party opponent. Fed. R. Evid. 801(d)(2)(D).[6] In addition, it was both a business record and past recollection recorded. Fed. R. Evid. 803(5), (6).

The Court of Appeals' conclusion that the opportunity to examine Cork about the contents of his memorandum rendered its exclusion harmless is in conflict with this Court's decision in *Gordon v. United States*, 344 U.S. 414 (1953). Ruling that the

[6] The Federal Rules of Evidence are applicable to bankruptcy proceedings. Bankruptcy Rule 917.

judgment below had to be reversed due to the exclusion of documentary evidence, Justice Jackson stated for a unanimous Court:

> The Court of Appeals affirmed on the ground that Marshall's admission, on cross-examination, of the implicit contradiction between the documents and his testimony removed the need for resort to the statements and the admission was all the accused were entitled to demand. We cannot agree. We think that an admission that a contradiction is contained in a writing should not bar admission of the document itself in evidence, providing it meets all other requirements of admissibility and no valid claim of privilege is raised against it. The elementary wisdom of the best evidence rule rests on the fact that the doument is a more reliable, complete and accurate source of information as to its contents and meaning than anyone's description and this is no less true as to the extent and circumstances of a contradiction. We hold that the accused is entitled to the application of that rule, not merely because it will emphasize the contradiction to the jury, but because it will best inform them as to the document's impeaching weight and significance.

344 U.S. 414, 420-21 (1953) (footnotes omitted); *cf.* Fed. R. Evid. 1002, 1004 (best evidence rule).

Where, as here, the excluded document was not merely intended for impeachment, but constituted part of Reminc's affirmative proof, an even stronger case for reversal exists.

What is more, the holding that the mere opportunity to elicit oral testimony concerning a writing remedies the writing's exclusion will have serious detrimental consequences on the conduct of litigation in the federal courts. The holding allows a trial judge, without reversal, to exclude a document which would be recognized as patently admissible by any second-year law student merely because the document's author was deposed. Under such a rule, responsible counsel expecting to use a deposition at trial would have no choice but painstakingly to

review each and every line of each and every document the deponent is shown. Not only would the unnecessary expense and burden associated with such a practice be immense, but it would mark such a substantial departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.[7]

3. THE COURT OF APPEALS' HOLDING THAT AN ASSIGNEE OF A CONTRACT RIGHT BECOMES AFFIRMATIVELY LIABLE FOR CONTRACT OBLIGATIONS IS SO CLEARLY WRONG AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION

Few principles of American jurisprudence are more firmly established than that a contract right may be assigned and that the assignee of a right does not become liable for any contract obligation of the assignor. As stated by the United States Court of Appeals for the Ninth Circuit,

> Merely as assignee one does not become affirmatively liable for a deficit in the accounts between his assignor and the other party to the assigned contract. Any such liability would have to be based upon an affirmative assumption, by the assignee, of the obligations of his assignor on the contract, or upon some independent contractual agreement.

United States ex rel. White v. Thompson & Georgeson, Inc., 346 F.2d 865, 869 (9th Cir. 1965); *see, e.g., Urban v. Phy*, 24 F.2d 494, 495 (9th Cir. 1928); *Ebling Brewing Co. v. Cereal Products Co.*, 6 F.2d 984, 985 (2d Cir. 1925); *Chatham Pharmaceuticals Inc. v. Angier Chemical Co.*, 347 Mass. 208, 209, 196 N.E.2d 852, 853 (1964); *Keyes v. Scharer*, 14 Mich. App. 68, 72, 165 N.W.2d 498, 501 (Ct. App. 1968); *Falkenstern v. Herman Kussy Co.*, 137 N.J.L. 200, 202, 59 A.2d 372, 374 (Ct. of Errors

[7] The record is clear that the complete contents of the memorandum were not actually in the deposition transcript. Many of Cork's answers merely incorporated portions of the document by reference. These portions of the transcript are wholly uninformative in the absence of the document.

& Appeals 1948); *Daniels v. Parker*, 209 Or. 419, 422-23, 306 P.2d 735, 736 (1957); *Shepard v. Commercial Credit Corp.*, 123 Vt. 106, 108, 183 A.2d 525, 528 (1962); 4 A. Corbin, *Contracts* § 906, p. 627 (1951) ("If the assignee has not contracted to perform the duties of the assignor, no action can be maintained against him, either by the assignor, or by the third party as a beneficiary."); 3 S. Williston, *A Treatise on the Law of Contracts* § 418A, p. 105 (3d ed. 1960) ("It is doubtless possible for a party to a bilateral contract to assign only the rights that will accrue to him under the contract without delegating performance of the duties."); *cf.* Williston, *supra* § 407, at 13 ("A clear conception of the law governing assignment of contracts can be obtained only by sharply distinguishing between attempted assignments of rights and of duties.").

The ability of an assignee to recover on a right, of course, is diminished by such defenses or claims as the obligor may have against the assignor. *Restatement (Second) of Contracts* § 336 (1981). These defenses and claims inherently limit the assignor's right to receive payment from the obligor. The assignor can convey to the assignee no more than he himself has. *Id.* Comment b.

A mere limitation on a right, however, does not afford an affirmative basis for recovery against the holder of the right. According to the drafters of the *Restatement (Second) of Contracts,*

> In appropriate circumstances the obligor may use defensively against an assignee an offsetting claim against the assignor, *although the assignee is not subject to affirmative liability on such a claim unless he contracts to assume such liability.*

Id. Comment c (emphasis added); *see* G. Grismore, *Principles of the Law of Contracts* § 259, p. 424 n.99 (rev. ed. 1965).

The Bankruptcy Court ruled that Reminc, which had use of the elevators, had an equitable obligation to pay for them. Memorandum Opinion, 11-12 (App. 18a-19a). Apart from the obvious inconsistency of this ruling with the applicable legal principles, there was clearly no windfall to Reminc here.

Reminc's entitlement to the elevators, and its obligation to pay for them, derive from the general contract with Citcon. Reminc made all required payments under the general contract and finally settled all accounts with Citcon. There was no evidence whatsoever that Reminc had any interest in or control over Citcon or that the general contractor's accounts were not settled on an arm's length basis. Citcon's ultimate failure or inability to pay is nothing more or less than the business and credit risk USE accepted when it signed the subcontract. In the final analysis, the Bankruptcy Court did not prevent a windfall, but awarded one to USE.[8]

4. THE COURT OF APPEALS' HOLDING THAT USE COULD BECOME A GENERAL CREDITOR OF REMINC AFTER REMINC PETITIONED FOR BANKRUPTCY IS IN CONFLICT WITH THIS COURT'S DECISION IN *UNITED STATES v. MARXEN.*

The Bankruptcy Act of 1898 fixes creditors' rights at the time the petition commencing bankruptcy proceedings is filed. *See, e.g., United States v. Marxen,* 307 U.S. 200, 207 (1939); *White v. Stump,* 266 U.S. 310, 313 (1924); *Everett v. Judson,* 228 U.S. 474, 478, 479 (1913); *Acme Harvester Co. v. Beekman Lumber Co.,* 222 U.S. 300, 307, 308 (1911); *In re C.H. Earle, Inc.,* 2 F. Supp. 15, 16 (E.D.N.Y. 1932), *aff'd,* 65 F.2d 1013 (2d Cir.), *cert. denied sub nom. Globe Indemnity Co. v. C.H. Earle, Inc.,* 290 U.S. 674 (1933). Consequently, a party cannot be recognized as a general creditor in a bankruptcy proceeding unless he extended credit to and thereby had a claim against the bankrupt prior to the bankruptcy petition. For bankruptcy purposes, a claim is defined as "a cause of action or ground for liability. . . ." *Continental Motors Corp. v. Morris,* 169 F.2d 315,

---

[8] *Fiberchem, Inc. v. General Plastics Corp.*, 495 F.2d 737 (9th Cir. 1974), relied on by the Bankruptcy Court, is inapposite. The *Fiberchem* court held that an assignee of a contract right to make a sale cannot collect the proceeds of the sale without paying a commission to the third party sales agent. The court merely protected the latent equities of the third party, who was not a signatory to either the original contract or the assignment. Such protection is routine. *See* Williston, *supra,* § 438; *Restatement, supra,* § 343. There is no comparable third party, and no comparable latent equity, here.

316, (10th Cir. 1948); *see In re Hayes,* 127 F. Supp. 514, 516 (D. Alaska 1955).

USE's original claim was based on the Virginia mechanic's lein statute. Va. Code § 43-7 (1981). This was a purely statutory right of action, wholly separate from USE's contract rights against Citcon. *See Coleman v. Pearman,* 159 Va. 72, 165 S.E. 371 (1932). The unsecured claim which was ultimately allowed by the Bankruptcy Court was based solely on the contract obligations purportedly assigned to Reminc by Citcon. The assignment did not occur, and the claim was not asserted, until well after the bankruptcy petition was filed.

The Bankruptcy Court permitted the claim by completely misreading this Court's decision in *United States v. Marxen.* In *Marxen,* the United States was assigned a right against a debtor after the debtor had petitioned for bankruptcy. The Court denied the United States the preference normally accorded its claims because the assignor—who held the debt when the petition was filed—would have had no such preference. The Bankruptcy Court here reasoned that since the United States' claim in *Marxen* was not extinguished, but treated as a general unsecured claim, USE's claim should also be treated as a general unsecured claim. (App. 12a-13a). This overlooks the very essence of the *Marxen* holding: the only claim that could be pressed was the one which existed when the petition was filed. USE's unsecured claim did not arise, if at all, until after the petition. *Marxen* requires not an affirmance, but a reversal.

CONCLUSION

In light of *Northern Pipeline*, the petition for a writ of certiorari should be granted and the judgment below summarily vacated. Should the Court regard summary action as inappropriate, the writ should be granted for all of the reasons set forth above.

Respectfully submitted,

STEPHEN N. SHULMAN
MARK C. ELLENBERG
CADWALADER, WICKERSHAM & TAFT
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 293-6300
Counsel for Petitioner

Of Counsel:
JAMES A. NEWELL
HOLYWELL CORPORATION
1300 N. 17th Street
Suite 500
Arlington, VA. 22209

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 81-1835

1616 REMINC LIMITED PARTNERSHIP,
Appellant,

v.

UNITED STATES ELEVATOR CORPORATION,
Appellee.

IN RE:

1616 REMINC LIMITED PARTNERSHIP,
Debtor.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Albert B. Bryan, Jr., District Judge.

Argued: May 4, 1982 Decided: June 10, 1982

Before BUTZNER, ERVIN and CHAPMAN, Circuit Judges.

Mark C. Ellenberg (Robert T. Lasky, Cadwalader, Wickersham and Taft; James A. Newell, Holywell Corporation on brief) for Appellant; H. Bradley Evans, Jr. (Evans, Economou and Pickard, P.C. on brief) for Appellee.

PER CURIAM

This is a bankruptcy proceeding in which appellee United States Elevator Corporation ("USE") asserted a claim against the debtor, appellant 1616 Reminc Limited Partnership ("Reminc"), for the balance due on a contract for the construction of an elevator system. Reminc asserted a counterclaim for breach of contract. A two-day trial was held before the United

States Bankruptcy Court on January 29 and 30, 1980. The bankruptcy court issued a memorandum opinion and order awarding USE $125,143.09 on its claim and denying Reminc's counterclaim. The United States District Court for the Eastern District of Virginia, Alexandria Division, ruling from the bench, affirmed the judgment of the bankruptcy court. The district court found that the bankruptcy judge had erroneously failed to permit introduction of a memorandum prepared by William Cork, but found this error to be harmless. Reminc timely filed a notice of appeal to this court. We affirm.

On March 16, 1973 USE contracted with Citcon Corporation ("Citcon") to design, construct and install an elevator system for use in the Xerox Building, located in Rosslyn, Virginia. Citcon was, at that time, the general contractor responsible for the construction of the Xerox Building. The building owner was Reminc.

The elevator system was first put into use by the tenants in early 1974. USE had a maintenance contract and continued to service the elevators until October 1976, when Reminc terminated the contract with USE and retained Westinghouse Corporation to service the elevators. Reminc eventually decided to install a new elevator system.

Shortly after the elevators in the Xerox Building began operation, USE sent one of their elevator mechanics, William Cork, to make some adjustments in the operation of the elevators. Shortly after performing this task, Cork prepared a memorandum detailing his evaluation of the operation of the elevators in the Xerox Building. Reminc claims this memorandum was a confirmation, from the mouth of a USE employee, of many of the deficiencies in the USE elevator system, the very deficiencies USE was attempting to prove at trial. The bankruptcy judge, however, refused to admit this memorandum into evidence.

Cork was no longer employed by USE at the time of trial. Since Cork was a California resident at the time of trial, Reminc took his deposition *de bene esse* in California and offered it into evidence at trial in lieu of his live testimony. During the deposition counsel for Reminc was free to question Cork about

the memorandum and did so in some detail. In light of this cross examination about the contents of the memorandum, which became a part of the record, we feel that any error in not admitting into evidence the memoranda itself, was harmless.

Reminc also raises with us issues concerning (1) the assignment of liabilities by Citcon, (2) USE's status as a general creditor, (3) the sufficiency of the evidence to support a finding that USE performed its contract in a workmanlike manner and (4) the constitutionality of Bankruptcy Rule 810. A review of the record, the bankruptcy court's opinion and the district court's affirmance discloses that these issues are without merit. With respect to these remaining issues, we affirm on the basis of the memorandum opinion entered by the bankruptcy court, *1616 Reminc Limited Partnership v. United States Elevator Corporation*, No. 75-659-8 (B.Ct.D.E.Va. February 23, 1981).

AFFIRMED.

IN THE

United States District Court

FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Chapter XII Proceeding
No. 75-659-A

Civil Action No. 81-202A

IN RE:

1616 REMINC LIMITED PARTNERSHIP,
Debtor.

1616 REMINC LIMITED PARTNERSHIP,
Appellant,

v.

UNITED STATES ELEVATOR CORP.,
Appellee.

TRANSCRIPT OF ORAL OPINION (July 10, 1981)

THE COURT: The bankruptcy Judge's opinion is thorough, and I would affirm generally on the basis of it. I think that insofar as whether this kind of an assignment carries with it the right of the creditor to sue the assignee as opposed to merely offsetting against the assignee any claim the assignee might make against the creditor, I think it has that right.

I think that the bankruptcy judge was correct in finding that as a practical matter this was an assignment of the entire contract. And, that the assignee took the burdens as well as the advantages of the assignment. And, one of those burdens was the liability that Sitkom had to this creditor, USE.

In addition, I think that since it's the same underlying claim secured until that lien was invalidated by the mechanic's lien or as an in rem claim against the premises of the owner and the same underlying claim being the in personam right against Sitkom, that it would be unfair to cut off the creditor's right to sue as an unsecured creditor after the assignment and after the security had been lost.

I don't base that on any inequitable loss of the security, but it was, nevertheless, lost, and it seems unfair if there is, in fact, a debt owed as the Bankruptcy Court has found, and that debt oweage, if there's such a word, has been assumed by Reminc to deny the creditor the right to recover for it.

I would probably agree with the appellant that the memo ought to have been admitted into evidence. That is the memo of Cork. But, if that was error to refuse its admission, it certainly was harmless. The material contents of the report were brought to the attention of counsel. I think counsel themselves had the report so that they could examine Cork concerning it, and I haven't been appointed to any crucial prejudicial effect of the nonadmission of the whole report in evidence.

I find that there was sufficient evidence, certainly to support the Bankruptcy's finding that the job was done in a workman-like manner. And, with that finding, it's unnecessary for me to reach a question of whether or not the statute of limitations had run on the bond since the bond, I believe, only had an obligation had to be met in the event of failure of performance.

For these reasons, the judgment of the Bankruptcy Court is affirmed.

I'll prepare the order.

Court will stand adjourned.

(Whereupon, the bankruptcy appeal motion in the above-captioned matter were concluded.)

* * *

IN THE

United States District Court

FOR THE
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Chapter XII Proceeding
No. 75-659-A

Civil Action No. 81-202-A

IN RE:
1616 REMINC LIMITED PARTNERSHIP,
Debtor.

1616 REMINC LIMITED PARTNERSHIP,
Appellant,

v.

UNITED STATES ELEVATOR CORP.,
Appellee.

ORDER

For the reasons stated from the bench, it is hereby

ORDERED that the Order of the United States Bankruptcy Court of February 23, 1981, is affirmed.

.....

United States District Judge

Alexandria, Virginia
July 10th, 1981

United States Bankruptcy Court

FOR THE EASTERN DISTRICT OF VIRGINIA

ALEXANDRIA DIVISION

In Proceedings for a
Real Property Arrangement
No. 75-659-A

IN THE MATTER OF:

1616 REMINC LIMITED PARTNERSHIP
Debtor-in-Possession

UNITED STATES ELEVATOR CORPORATION
Plaintiff

v.

1616 REMINC LIMITED PARTNERSHIP
Defendant

MEMORANDUM OPINION

The defendant, 1616 Reminc Limited Partnership ("Reminc") is a debtor-in-possession in a Chapter XII proceeding under the Bankruptcy Act presently before this Court. The plaintiff, United States Elevator Corporation ("USE"), initiated an action against Reminc by way of an Amended Complaint filed on July 9, 1976, seeking a recovery in the amount of $177,885.00.[1] Reminc filed a counter-claim in the

[1] J. B. Jenkins, Manager of Contracts for Cubic Corporation (USE is a wholly-owned subsidiary of Cubic) testified that the amount due to USE under the contract was $112,343.09. An additional $65,356.00 was spent on overhead steel supports for the elevator system in the Xerox Building. He indicated that he would defer to the judgment of John A. Miller, an expert witness for USE, as to the amount recoverable for the overhead steel support construction. Miller opined that the actual amount spent on this particular aspect of the installation of the elevator system was $12,800.00. *See infra* at page 22.

amount of $1,500,000.00 and also served The American Insurance Company [Fireman's Fund] ("American") in a suit on a performance and payment bond, as surety, in connection with USE's contractual obligations for the installation of an elevator system in Reminc's principal asset, an office building.[2] The building in question is located at 1616 North Fort Myer Drive, Arlington, Virginia, and is commonly referred to as the "Xerox Building".

USE is a wholly-owned subsidiary of Cubic Corporation. On March 16, 1973, USE entered into a subcontract with Citcon Corporation, the general contractor for Reminc during the construction of the Xerox Building. Under this subcontract, USE agreed to install two hydraulic and six electric elevators in the Xerox Building.

This Court determined, by an Order entered on January 15, 1977, that USE's waiver of mechanic's lien rights was validly and properly executed by USE. This had the effect of disallowing USE's claim as a secured claim against Reminc's real estate.

Prior to this Court's decision invalidating USE's mechanic's lien, USE made application to be treated as an unsecured creditor under Rule 12-30 of the Rules of Bankruptcy Procedure by virtue of an assignment entered into by the general contractor of the Xerox Building, Citcon Corporation ("Citcon"), as assignor, and Reminc as assignee. Reminc obtained this assignment on August 6, 1976.

On August 15, 1975, Reminc filed a petition initiating the proceedings before this Court. The Plan of Arrangement was confirmed on May 19, 1976.

Several issues are before the Court for resolution. First, is American liable, as surety, on any defects in construction on the part of USE in installing the Xerox Building's elevator system?

---

[2] By order entered May 17, 1977, the case of 1616 Reminc Limited Partnership v. American Insurance Company was consolidated with this adversary proceeding and, accordingly, the finding of facts and conclusions of law in this adversary proceeding will be dispositive of the American Insurance Company case.

Second, does USE remain liable as a principal under the performance bond even if the surety is released therefrom? Third, can USE's claim as an unsecured claimant be asserted against Reminc as assignee? Fourth, has USE established that the installation of the elevator system was accomplished in a workmanlike manner and in accordance with the terms and specifications of its subcontract? Fifth, is Reminc entitled to damages as alleged in its counterclaim against USE?

Admitted into evidence is a "Contract Bond—Dual Obligee" between Reminc and American. USE is the principal under this bond. American agreed therein to furnish a bond in the amount of $459,000.00 for the performance of USE's obligations under the contract. Paragraph six (6) of the bond states that:

> "[N]o suit, action or proceeding shall be had or maintained against Surety [American] on this bond unless the same be brought or instituted within one (1) year after the date of the completion of the work by Principal or after the date of any default by Principal in the performance of the contract."

It is uncontroverted that Reminc signed temporary acceptances of the elevator system, dated August 16, 1974. Reminc later signed a final acceptance of the hydraulic elevators on March 15, 1974, and the six elevators on February 24, 1975.

In Virginia, a provision in a bond "which bars recovery from the surety after the expiration of one year following the date on which" the principal completed work on its contract is valid. 3A Michie's Jur., *Building Contracts*, § 22 (1976 Replacement). *See Contee Sand and Gravel Company, Inc.* v. *Reliance Insurance Company*, 166 S.E.2d 290 (Va. 1969).

Reminc argues that within the context of the Chapter XII proceedings, it asserted USE's liability for defective performance as part of its Objection to Claim, filed on January 26, 1976. To come within the one-year period mandated under the bond, would require Reminc to establish that its filing of an objection to claim on January 26, 1976, effectively tolled the statute as to American. USE asserts that Larwin Mortgage

Investors (not a party to the bond) initially filed the objection, rather than Reminc. It follows that since American was not named as a party in the suit until Reminc filed suit on the bond on November 9, 1976, American was without notice that its obligations under the bond had been invoked.

Reminc further argues that its acceptance of the elevator system does not constitute a completion of the work by USE, and asserts that since USE continued to work on the elevator system after final acceptance, it is within the one-year statute of limitation under bond. In support of its position Reminc relies upon the testimony of L. William Cork, as it appears in a deposition *de bene esse*. Cork, an elevator adjuster with USE in 1975, was sent to the Xerox Building to make corrections in the elevator system. He was employed in USE's contract and engineering section, rather than its maintenance section. Reminc urges that this fact evidences continued activity.

Admitted into evidence is a document entitled "Service Department Contract A," a maintenance agreement between USE and Reminc, dated June 6, 1974. Attachment I to this contract states in part that "[t]his contract includes three (3) months free service which will commence on the date each elevator is inspected, accepted and placed into permanent operation."

The Court takes cognizance of a letter addressed to J. B. Jenkins (an employee of Cubic Corporation) from Evans L. Morrison (an employee of Performance Profiles, Inc., an expert witness for USE), dated April 29, 1976, wherein Morrison states that "[f]ine tuning adjustments should not be considered as having a relation to completion. It is normal to accept equipment and have it 'touched up' later." Morrison also stated that "[b]ased upon the elevator performance data acquired at the job, there is no question that the individual cars and the elevator group are complete—the job is finished." Morrison reiterated the views expressed in this letter on direct examination in the instant proceeding.

Robert Calhoun Smith, the architect for the Xerox Building, endorsed numerous worksheets admitted into evidence entitled "Application and Certificate for Payment" for work

completed between August 1, 1974 and October 30, 1974. Each of these documents indicated that one-hundred percent of the work on the elevator system had been completed. In a report to the General Partner of Reminc, dated July 24, 1974, the architect made a notation regarding two of the elevator cars to the effect that although there existed some bounce when a passenger entered the cabs, "[t]he elevators appear[ed] to be installed in accordance with the manufacturer's recommendations and shop drawings."

Having reviewed the record with respect to this issue, the Court concludes that the elevator system was essentially completed on the dates on which Reminc signed the final acceptances for the system. Therefore, the statute of limitations stipulated in the bond, having begun to run as of the final acceptance dates, acts as a bar to recovery by Reminc on the bond in the amount of $459,000.00 against American.

The Court next considers whether USE remains liable as a principal under the bond, even though American has been released from its obligation under the bond.

It is well settled that a surety's obligation under a performance bond "is primary and original as well as direct." *E. R. Christenson* v. *Diversified Builders, Incorporated,* 331 F.2d 992, 995 (10th Cir. 1964). The general rule is that "a creditor's right to proceed against the surety exists independently of his right to proceed against the principal." *Id.* In *Maule Industries, Inc.* v. *Cohen,* 117 So.2d 37, 39 (3d D.C.A. Fla. 1960), the court stated:

> "[T]he principal debtor is at all times liable for the entire and full debt. He is in no way relieved from any responsibility whatsoever by the fact that he has a surety who is secondarily liable. . . . Although consideration may be given by the creditor to the presence or absence of a surety in weighing as a business decision the advisability of contracting in the first place; it is immaterial to the question of primary liability of the principal to his creditor."

This principle of law is applicable to the situation at hand and, accordingly, USE is still answerable to any existing liability.

Next, the Court turns to the matter of Reminc's liability as assignee of Citcon.

It is USE's contention that Reminc had knowledge of the former's claim prior to the assignment and that the assignment by Citcon to Reminc can only be considered as an assignment of the entire contract, thus requiring Reminc to assume the liabilities of Citcon including the payment due USE. Reminc raises the counter contention that the invalidation by this Court of USE's mechanic's lien rights also extinguishes its claim and that the assignment which occurred after the filing of the petition cannot recreate a debt already extinguished.

Reminc's Chapter XII petition initiating these proceedings was filed on August 15, 1975. The Plan of Arrangement was confirmed on May 19, 1976. The assignment in question was obtained on August 6, 1976. The Complaint filed by USE[3] alleged a claim (the unpaid balance of funds owed by Citcon—the insolvent general contractor for Reminc—to USE) against Reminc which existed as of the filing of the petition, based upon a mechanic's lien on Reminc's real estate (principally the Xerox Building). This Court determined on January 25, 1977 that USE waived its rights under the mechanic's lien. Reminc contends, therefore, that there remains no basis upon which USE can claim to be a creditor as of the filing of the petition in order to share in the Plan's provisions for such creditors.

Reminc's position is that under Rules 12-30(a) and 12-11(a) of the Rules of Bankruptcy Procedure, USE must have in its possession a provable claim against Reminc as of the filing of the petition initiating these proceedings; that this proposition is a fundamental principle of bankruptcy law and "is totally dispositive of any creditor's right to have its claim allowed and share in distribution."

Reminc refers the Court to *United States* v. *Marxem*, 307 U.S. 200 (1939). Although *Marxem* notes the proposition cited by Reminc, it does not resolve the issue at hand. *Marxem* involved a bankrupt maker of a note who defaulted on the said

[3] USE filed an Amended Complaint to be considered as a general unsecured creditor.

note which was given by a bank shortly before the former filed bankruptcy. The United States, which guaranteed the loan, paid the bank and took an assignment of the note. The United States later filed a claim with the bankruptcy court in its own name. This claim was allowed as a general claim only. The *Marxem* court, in acknowledging the status of the United States as a general claimant, found that since the bank's claim was assigned after the bankrupt filed its petition, the United States' claim could not be given a priority over other claimants whose claims became fixed as of the date the bankruptcy petition was filed. Thus, based upon the question placed before the *Marxem* court, the United States' claim was not extinguished but only denied a priority.

The law in Virginia, by statute, clearly provides that the remedies granted by the Mechanic's Lien statute shall be cumulative and not in lieu of any other legal or equitable remedy. *Code of Virginia,* 1950, as amended §43-23.2. The remedy of the mechanic's lien statute is to grant a priority and the extinguishing of such priority does not in and of itself extinguish the claim.

Reminc next argues that the assignment by Citcon is not an assignment of an executory contract giving rise to an assumption of performance obligations, but rather is an assignment of rights of action. The assertion is made that the assignment of a right of action to recover damages, as distinct from the contract itself, is a principle of long standing in Virginia. Reminc contends, therefore, that it should not be held affirmatively liable for any obligations of Citcon under the latter's subcontract with USE. It is in this context, by way of analogy, that Reminc refers the Court to *Code of Virginia,* 1950, as amended, § 8.2-210(2), which states that:

> "A right to damages for breach of the whole contract or a right arising out of the assignor's due performance of his entire obligation can be assigned despite agreement otherwise."

The *Official Comment* to this section refers to the assignment of "rights which are no longer executory [and that] in such cases no question of delegation of any performance is involved."

Reminc also cites a decision by the Ninth Circuit, *United States for the Use of White* v. *Thompson & Georgeson, Inc.*, 346 F.2d 865 (9th Cir. 1965). In that case a subcontractor (Dunbar), involved in performing certain road construction work, assigned to one of its creditors (White) sums due and to become due under its subcontract. Contemporaneous with this agreement, White entered into another agreement with the general contractor (T&G). The latter party therein recognized the assignment between White and Dunbar. White, in the second agreement, agreed to become responsible for certain specific liabilities of Dunbar and agreed further to pay them within a reasonable time should Dunbar be unable to do so. Dunbar later abandoned the construction of the road leaving T&G to complete the project at its expense and to incur the expense of settling with Dunbar's creditors. When White sought to recover the subcontract amount less monies paid, T&G countered that not only were there no monies due but that White should be affirmatively liable for the deficit created by the excess of T&G's remedial and settlement expenses incurred over the contract funds left in its hands.

In reviewing the two agreements, the *White* court concluded that neither of these agreements contemplated that White was to receive any "contract money from T&G without offsets arising out of the accounts between Dunbar, the assignee and T&G." *Id.* at 869. Reminc relies upon the assertion made in *White* that "[m]erely as assignee one does not become affirmatively liable for a deficit in the accounts between his assignor and the other party to the assigned contract" as controlling in the instant matter. *Id.* Reminc observes that the *White* court found that the only possible basis for such a judgment would be a separate, express hold-harmless agreement between the assignee and the general contractor (i.e., similar to the agreement entered into between White and T&G, with White as Surety for Dunbar, not as his assignee).

Reminc states that the assignment contains neither an affirmative assumption of contract obligations nor suggests a separate, independent contractual arrangement between it and USE. It is on this basis that Reminc disavows any liability on the August 6, 1976 assignment relied upon by USE.

USE, however, urges that *White* does not support Reminc's position. USE refers to the Ninth Circuit's understanding of White's principal contentions, to the effect that:

> "White asserts (1) that Dunbar had substantially completed its subcontract and that therefore the balance of the contract price was nearly all earned and was due to White as Dunbar's assignee; (2) that White is not liable for the expenditures made by T&G to complete Dunbar's work . . . ."

Id. at 868.

USE argues that White was asserting that the assignment between White and Dunbar enlarged the original contractual liability of T&G. Under this view, White sought court approval for the proposition that despite the fact that T&G had to expend additional sums to complete Dunbar's work, T&G would, nevertheless, be compelled to make a double payment by virtue of the assignment. The *White* court rejected White's contentions by declaring that there was no demonstrated intention by either Dunbar or White that the project had been substantially completed. Nor did the court in *White* concur in White's assessment that he was not liable for the expenditures made by T&G to complete Dunbar's work by virtue of the agreement between White and T&G. USE argues that it is within this context that the *White* court, at 869, stated: "[m]erely as *assignee* one does not become affirmatively liable for a deficit in the *accounts* between his assignor and the other party to the assigned contract." (Emphasis added.) USE asserts that the application of the *White* holding to the facts of the instant case would create a serious inequity and a result not intended by the *White* court.

USE takes the position that the contract assigned by Citcon to Reminc was executory in nature in that Reminc was fully aware, prior to the August 6, 1976 assignment, that Citcon had not paid the balance on the agreed contract amount owing to and due USE. USE notes that Reminc was cognizant of USE's claim inasmuch as Reminc listed a disputed mechanic's lien claim of $112,349.09 in its original petition.

USE relies upon *Rose* v. *Vulcan Materials Company*, 194 S.E.2d 521 (N.C. 1973), wherein the North Carolina Supreme Court, in referring to transactions governed by the Uniform Commercial Code, adopted the rule expressed in the Restatement of Contracts, § 164 (1932). The Rose court, adopting this rule, stated:

> "[T]hat the assignee of an executory bilateral contract under a general assignment becomes not only the assignee of the rights of the assignor but also the delegatee of his duties; and that, absent a showing of contrary intent, the assignee *impliedly* promises the assignor that he will perform the duties so delegated. 3 Williston, *Contracts*, § 418A (3d ed. 1960)."

Id at 533 (emphasis in original).

Under the applicable provision of the Uniform Commercial Code, as adopted in North Carolina (G.S. § 25-2-210 (4)), "an assignment of a contract in general terms is a delegation of performance of the duties of the assignor, and its acceptance by the assignee constitutes a promise by him to perform those duties." *Id.* at 534. The *Rose* court indicated that its findings "maintains a desirable uniformity in the field of contract liability." *Id.*

Virginia has adopted the Uniform Commercial Code provision construed by the *Rose* court—*Code of Virginia*, 1950, as amended, § 8.2-210(4). The *Official Comment* to this section states that this "subsection lays down a general rule of construction . . . [with respect to] . . . a normal commercial assignment, which substitutes the assignee for the assignor both as to rights and duties . . . ."

The Virginia Supreme Court in *Economic Water Heating Corporation* v. *Dillen Supply Company*, 159 S.E. 78, 81 (Va. 1931) observed that " '[w]hen a party assumes the contract, or undertaking, of another he makes it his contract.' "[4]

---

[4] In further support of its position that Reminc assumed the burdens as well as the benefits of the assigned contract, USE refers the Court to Sections

(footnote continued)

In *Keys* v. *Scharer,* 165 N.W.2d 498, 501 (Mich. App. 1968), the court stated that "[i]f an assignee does not expressly assume his assignor's obligations it becomes a question of interpretation whether he has impliedly agreed to assume such obligations." *See* 6 Am. Jur. 2d, *Assignments,* § 109 (1964).

The general rule is "that an assignment of a contract does not operate to cast upon the assignee the duties and obligations or liabilities imposed by the contract on the assignee, in the absence of the assignee's assumption of such liabilities." 6 Am. Jur. 2d, *Assignments,* §109 (1964).

However, this principle is not applicable in the instant matter. The general rule is applicable to those situations where an assignor owes an assignee money and the assignor is unable to pay it. In order to make good his obligation, the party in debt assigns his rights as assignor to the creditor as assignee. The purpose of the rule is to protect the bona fide purchaser (assignee) from being confronted with a large and unknown counterclaim. Certainly, this is not the case in the instant proceeding. The weight of the evidence adduced at trail indicates that Reminc was fully aware of USE's claim against Citcon. In any event, one authority states:

> "It is not to be inferred from the [general] rule that the assignee of a contract is not personally

---

(footnote continues)

11.1 and 12.1 of the contract between Citcon and Reminc which deals with the latter parties' reciprocal obligations to one another. Section 11.1 provides:

> "The Subcontractor [USE] shall be bound to the Contractor [Citcon] by the terms of this Agreement and the Contract Documents between the Owner [Reminc] and the Contractor and [the Subcontractor] . . . shall have the benefit of all rights, remedies and redress against the Contractor which the Contractor, by those Documents, has against the Owner . . . ."

Section 12.1 of the contract provides:

> "The Contractor shall be bound to the Subcontractor by the terms of this agreement and of the Contract Documents between the Owner and the Contractor and shall assume toward the Subcontractor all the obligations and responsibilities that the Owner, by those Documents, assumes toward the Contractor . . . ."

> responsible to the other party to the contract for the obligations imposed by the contract on the assignor unless he assumes such obligations, so that he may enforce the contract without the performance of the obligations which it imposes. On the contrary, he takes the right with all the burdens to which it was subject in the hands of the assignor, and if he undertakes to enforce the right by an action, he must show that the conditions have been performed either by his assignor or by himself."

Id. at §111.

USE asserts that by seeking to exert some affirmative right against it by virtue of the general assignment of the executory bilateral contract in question, Reminc becomes a delegatee of Citcon's duties and is required to perform such duties under the assigned contract. USE also asserts this proposition is especially applicable in the present case inasmuch as Citcon was bought out by Reminc for $15,000.00 following confirmation of the Plan of Arrangement, after which Citcon ceased to conduct business.

The Ninth Circuit decision in *Fiberchem, Inc.* v. *General Plastics Corporation*, 495 F.2d 737 (9th Cir. 1974) is relied upon by USE as being on point and applicable in the instant matter in part because it deals with a subsequently insolvent assignor.[5] In that case, the assignor filed for bankruptcy and the assignee explicitly disavowed any liability upon taking the assignment. The Ninth Circuit, in finding that it was "undisputed that Rowland [assignee] purchased assets from General [Plastics] [defunct assignor] with full knowledge of Fiberchem's right to commissions," *Id.* at 738, stated:

> "Although there is some dispute whether or not an assignee for value takes his claim free from the equities of third persons against the assignor, of

[5] Reminc contends that *Fiberchem* is not applicable on the grounds that it involved the equities of a third party beneficiary (the sales agent to whom commissions were owing) rather than dealing with defenses or claims set up against an assignee by the original party to the contract under which rights were assigned.

> which the assignee had no notice, there is no dispute that the assignee takes his claim subject to the equities of third parties against the assigned right where he has knowledge of such equities."

Reference is had to the dissenting opinion in *Fiberchem* authored by Judge Sneed, wherein he would have had the matter remanded to the district court to determine the question of unjust enrichment. *Id.* at 740. The majority stated that the district court judge, in his opinion, had considered the issue of unjust enrichment, thereby obviating a need to remand. USE argues that if this Court finds USE's argument to be valid, Reminc's theory that it takes the assignment without any resulting liability must be found to be without merit. To hold otherwise would not only unjustly enrich Reminc but would also create a situation of great inequity in that the Xerox Building would be improved by the elevator system installed by USE for which Reminc would be excused from all further payment.

In the instant case, Reminc had knowledge of USE's claim and to permit Reminc to receive benefits of the assignment without requiring it to accept the responsibilities clearly creates a situation of unjust enrichment as addressed by the Ninth Circuit in *Fiberchem, supra.*

The application of the rule in *Rose* v. *Vulcan Materials Company, supra,* is also valid here. There is no showing of an intent not to perform the responsibilities of the assignor by Reminc, and equity requires that to maintain a free and equal standard, as well as conformity in the law, that the assignee must accept the liabilities along with the benefits.

USE asserts that, by virtue of Citcon's assignment to Reminc, it is entitled to affirmatively recover from Reminc the remaining sums of money due and owing to it under its subcontract with Citcon. In order to recover the sums of money due under the subcontract, USE must establish that the installation of the elevator system was completed within the terms

and conditions of the subcontract and the specifications for the project, and was done in a workmanlike manner.[6]

The Supreme Court of Iowa in *Smith* v. *Cedar Rapids Country Club*, 124 N.W.2d 557, 564 (Iowa 1963) observed that "[o]ne of the tests for the admission of an expert opinion is whether the subject matter is such, and the witness is so qualified, as to aid the [trier of fact] in the proper determination of a question before [him]." Similarly, the Virginia Supreme Court recognizes that the knowledge to qualify a witness to speak as an expert may be derived from experience as well as by study. *Norfolk and Western Railway Company* v. *Anderson*, 151 S.E.2d 628, 631 (Va. 1966).

A witness may testify as an expert where his opinion is derived from practical experience in an occupation which confers upon him special knowledge not within the general knowledge of the lay person. One general rule governing the admission of such testimony indicates that when a person is engaged in an occupation for a reasonable time, it may be assumed that he has "the ordinary knowledge common to individuals so engaged." *State* v. *Brady*, 140 S.E. 546, 550 (W. Va. 1927).

When a party to a proceeding proffers the testimony of a witness as that of an expert, "the lack of strong qualifications ... affect[s] the weight rather than the admissibility of the evidence." *Smith* v. *Cedar Rapids Country Club, supra*, 124 N.W.2d at 566. It is for the trier of fact to determine the weight to be given to the testimony of an expert witness. Accordingly, the weight given the testimony by the above-referenced witnesses for Reminc will be considered in the light of the foregoing.

---

[6] A contractor under a construction contract implies that his work will be done in a reasonably good and workmanlike manner. A contractor undertaking a project impliedly represents that he will exercise a degree of skill necessary to complete the job he has undertaken. *Mann* v. *Clowser*, 59 S.E. 2d 78 (Va. 1950). The standard which the law exacts for a contractor to meet this implied warranty is one of ordinary care and skill. *Cantrell* v. *Woodhill Enterprises, Inc.*, 160 S.E. 2d 476 (N.C. 1968).

A review of the record reveals that much of the evidence in the record concerns the presence and severity of a so-called "bounce" which allegedly existed in the six electric elevators following their installation by USE. The weight of the testimony reveals further that most elevators tend to bounce to some degree when they come to a landing. Testimony was had that due to height restrictions placed on the Xerox Building in the planning stages prior to construction it was necessary to put the elevator system's machine room in the basement rather than on the roof. Two witnesses for USE, Leonard Avery and John A. Miller, testified that in a building with nineteen landings (such as the Xerox Building) it is somewhat unusual to specify a basement operation elevator system. The reason given by these witnesses is that a basement machine has twice the normal hoist rope that an overhead machine would have. Testimony was also adduced to show that the wire cable (hoist rope) in a basement operation normally stretches when new and, thus, requires periodic shortening. As an elevator car is loaded and unloaded, the wire cable will stretch in order to maintain a constant tension. Therefore, necessarily, the wire cable must maintain a certain degree of elasticity in order to perform its function properly.

Charles Calderone, an associate with the Transport Systems Group of Syska and Hennessy (an engineering firm), was called as a witness for Reminc. Calderone testified that the last time he examined the elevator system was in late 1976 or early 1977. Calderone acknowledged that he wrote a letter to Henry J. Brown, an architect with the firm of Grigg, Wood and Browne, dated August 26, 1976. Calderone indicated therein that Richard Langelotti, another employee of Syska & Hennessy, had visited the Xerox Building in October of 1975 and found the elevator system to be "in generally good condition". Langelotti's testimony corroborated this testimony. A later field inspection conducted in January of 1976 by Langelotti caused him to conclude that the "bounce" had improved. Langelotti further corroborated this statement in the August 26, 1976 letter, and remarked that USE "had made adjustments to the leveling controls, had lengthened the leveling, deceleration time."

Included as enclosures in Calderone's letter to Brown were letters addressed to Calderone from representatives of Montgomery Elevator Company and Otis Elevator Company. The enclosure letters reflect that both companies declined to bid on a basement operation within the specifications proposed by Syska & Hennessy which required "no bounce."[7] One of the enclosures, a letter dated June 21, 1976, from C.M. Neff, Branch Manager of Montgomery Elevator Company, states in part:

> "[T]he initial application of basement geared elevators to serve 19 floors is questionable due to the considerable amount of travel imposed upon basement machines which were originally designed for somewhat less travel and speed. A considerable amount of hoisting cable is involved . . . which readily lends itself to the bouncing of the car [as it approaches a landing] and which is due to the stretch of the cable common over such a large amount of travel."

Calderone, in stating that he forwarded these letters to Brown, acknowledged that he voiced no contrary opinion to the conclusions reached therein.

Testimony elicited that there existed a letter addressed to John Hettlemen, Vice President of Syska & Hennessy, from Otis Elevator, dated September 24, 1976. Calderone testified that he had seen this letter. He acknowledged that Otis Elevator stated therein that a basement machine operation would preclude meeting the requirement that a new elevator system would be "bounce free".

There was also testimony to the effect that the cable used by USE was not satisfactory. The specifications called for "high strength" cable. USE indicated that there would be no appreciable effect from changing the one-half inch cable in

---

[7] 1616 Reminc is cooperating financially with Xerox to replace the existing elevator system with an overhead operation, gearless, high-speed elevator system, to be provided by Westinghouse. Xerox is financially responsible for two-thirds of the installation costs, approximately $467,000.00.

place with cable of larger diameter. Although Calderone did not agree with USE's findings, he admitted that in Westinghouse's proposal to install a new elevator system, the cables installed by USE were to be reused.[8]

As part of the record in this case is filed herein the deposition *de bene esse* of L. William Cork, Jr. By stipulation of the parties, Cork's deposition will be considered as testimony in this matter. Cork was an elevator adjuster for USE in October of 1975 when he visited the Xerox Building to examine the elevator system. Reminc offered into evidence Defendant's Exhibit "NN", a memorandum which purports to be a typed transcript of draft notes which Cork wrote while acting as an employee of USE. USE requested that the Court reserve ruling on the admissability of this exhibit so as to allow the Court an opportunity to make a further review of Cork's deposition.

Reviewing a deposition *de bene esse*, as if it constituted live trial testimony, is somewhat difficult for the Court in that it is impossible to determine the witness's demeanor, and related matters. This is particularly true in instances where the Court must determine whether Cork exhausted his present recollection pertaining to the events encompassing his inspection of the elevator system on the Xerox Building and, if this was the case, whether it was proper to use the memorandum in question either to refresh his memory or to allow its admission as a statement of past recollection recorded.

Rule 612 of the Federal Rules of Evidence, as applied under Rule 917 of the Rules of Bankruptcy Procedure, governs the manner in which writings may be used to refresh the recollection of a witness while he is giving testimony. It is clear that the witness' recollection must be revived after the writing is

---

[8] Calderone stated that the trend for modern elevators was to use "extra high strength steel which is designed for 'gearless' machines." The elevators installed by USE, however, are neither gearless nor high speed.

Miller testified that the specifications called for the use of traction-steel ropes designed for elevator service. The approved drawing indicated that high-strength traction steel ropes were provided. He also testified that Bethlehem Steel rope—styled "traction steel rope"—comports with "high strength traction steel rope" required in the specifications.

presented to him as a stimulus so that his testimony properly constitutes a present recollection.[9] If the writing fails to revive his recollection, the writing may be read into evidence and admitted, but only if it meets the test of recorded recollection set forth in Rule 803(5) of the Federal Rules of Evidence. As McCormick aptly notes, "[t]he line between using the writing as an aid to memory and basing one's testimony upon it as a correct record of past memory is sometimes shadowy." McCormick, *Evidence*, §9 at 18 (1954).

It is the general rule that "[w]hen a party uses an earlier statement of his own witness to refresh the witness's memory . . . the party may not put the statement in evidence, although the other side may do so." *United States* v. *Rappy*, 157 F.2d 964, 967 (2d Cir. 1947), *cert. denied*, 329 U.S. 806 (1947), *See Portman* v. *American Home Products, Corp.*, 201 F.2d 847, 850 (2d Cir. 1953). McCormick is in general accord with this view: "the party offering the witness may not [submit memoranda to the jury for examination] . . . and the cardinal rule is that they are not evidence, but only aids in the giving of evidence. . . ." McCormick, *Evidence*, §9 at 18 (1954).

As noted by one authority, it is generally "recognized that since a record of past recollection used by a witness after verification becomes his present evidentiary statement, it may be admitted in evidence in connection with his testimony, as part of his direct examination." 29 Am. Jur. 2d *Evidence*, §877 (1967). However, a memorandum is not admissible as independent evidence to prove any fact to which the party making it could testify from his recollection. *Phoenix Insurance Company of Brooklyn* v. *Public Parks Amusement Company*, 37 S.W. 959 (Ark. 1896).

---

[9] Case law construing what constitutes the proper foundation for the admission of a writing to refresh a witness' recollection requires that the movant establish the following elements: first, the witness' recollection must be exhausted; second, the movant must establish the time, place and person to whom the writing was given; third, the Court must be satisfied that the writing accurately reflects the witness' statements, or that the witness acknowledges the accuracy of the writing. *Goings* v. *United States*, 377 F.2d 753, 760 (8th Cir. 1967). Only when the Court is satisfied that these criteria have been met and "is further satisfied that it may be of help in refreshing the [witness'] memory should the witness be allowed to refer to the document." *Id.*

Rule 803(5) of the Federal Rules of Evidence provides that a "memorandum . . . concerning a matter about which a witness once had knowledge" may be admitted as a "recorded recollection" only in those instances when the witness "has insufficient recollection to enable him to testify full and accurately." In addition to this requirement, a memorandum may be used as evidence only if the witness either made or adopted the memorandum with the knowledge that the facts contained therein are accurate. The determinative factor here is that Cork could not recall whether the memorandum marked for identification as Defendant's Exhibit "NN" accurately reflected what was in his draft notes. Cork stated that although he did not recall the contents of the memorandum verbatim, he did recall the general contents of the memorandum that he submitted to USE. In *United States* v. *Judon*, 567 F.2d 1289, 1294 (5th Cir. 1978), the Fifth Circuit held that it was error to admit a statement pursuant to Rule 803(5) where there had been no showing of the witness' insufficient recollection.

With respect to Cork's identification of the memorandum as a typed transcript of the draft notes he submitted to USE, Cork stated:

> "I turned in a rough draft over five years ago, I guess. That memo was typed. I did not get a chance to proof read it and I did not sign it and I don't remember five years later if this [Defendant's Exhibit "NN"] is an exact copy of what I turned in."

Cork made the remark that "[t]his appears to be the copy of my rough draft, but I have no way of knowing if it is." The transcript of the deposition reflects that counsel for Reminc had not anticipated Cork's reluctance to adopt the memorandum as a verbatim transcript of the latter's draft notes. The transcript also reflects that the memorandum was extensively referred to by counsel.

Having had an opportunity to review Cork's testimony on the use of Exhibit "NN", and noting the admonition against receiving the memorandum as an exhibit (unless offered by an adverse party) under Rule 803(5), the Court finds that Cork

did have a present ability to recall the contents of the memorandum *he* submitted to USE and, accordingly, Reminc's use of this exhibit under this Rule must be denied. Further, inasmuch as Cork was unable to adequately identify the typed draft, Reminc has not established the proper predicate for admitting it as an exhibit. Accordingly, its admission as an exhibit must be denied.

With respect to Cork's testimony in general, the Court will give it due consideration not inconsistent with its ruling on the weight to be given to the testimony of witnesses proffered as experts.

Reminc notes that Cork made several initial observations as to the condition of the elevator system. He stated that the cars bounced severely when approaching a landing. The cars frequently went into a mode which he termed as the "final limits". He also testified that their difficulty in handling the traffic was caused principally by slow landing-to-landing times and multiplex problems.

Cork testified that going into the "final limits" is a part of the safety circuit that stops the elevator, thus removing power from the driving machine and the door operation. He testified that "[t]he [elevator] cars hadn't been in limits at all from the second day [he] was on the job." When Cork left the job he classified the performance of the elevator system, with respect to leveling (bounce) and any final limits problem, as good.

Cork observed that the slowness of response time to passenger calls for elevator service was due to the fact that of the six elevator cars in the system, one "was under the building contractors' use and the elevator construction crews had another car out for modifications." A third elevator was frequently used by what Cork termed "building VIPs" for their personnel use. He concluded that the elevator cars were answering hall calls "in less than thirty seconds," and he considered that the multiplex control which directed the car to the hall calls was "working pretty good [sic]."

Cork's testimony further revealed that he disconnected a device known as a TMR coil, "an electrical device that operates

a mechanical relay." He observed that although his action might have some effect on the machinery, it in no way "affect[ed] the safety of the passengers."

Cork testified that he was unfamiliar with the local building code. He also candidly acknowledged that much of his testimony was subject to different interpretations by engineers and other persons qualified to examine and evaluate elevator systems. Cork indicated that he had only rudimentary test equipment while at the Xerox Building. He further admitted that "[o]thers with test instruments would have a better chance" to analyze the existence of a "bounce" in the elevator cars.[10]

Leonard Avery, service sales manager for USE, testified that he inspected the elevator system in the Xerox Building over a period of five nights, six hours a night, in early 1976. He observed that construction was still continuing in the building. One car was taken out of service for use by the construction crews as a "hod hoist." As evidenced by the condition of the Xerox Building's basement machine operation, Avery testified that while construction work was in progress, the contruction crews abused the elevators. The resulting dust reduced the operational effectiveness of the "door locks[,] . . . contacts and relays down in the controller."

Avery also testified that there was a water leakage problem in the machine pit which caused a motor to burn out, and that USE was not responsible for the installation of water-carrying pipes into the machine pit. Avery further testified that he had asked Theodore Gould, general partner of Reminc, whether Gould thought the bounce was objectionable. Gould, according to Avery, replied that he felt the elevators were operating in a correct manner. Avery concluded that he did not witness a bounce in the elevator system, only a "normal amount of jiggle

[10] Evans L. Morrison, an expert witness for USE, conducted numerous tests with equipment specifically designed to evaluate the leveling speed, passenger-carrying capacity, flight time and performance of an elevator system. Morrison testified that even though only five of the six cars in the elevator system were operating when he conducted the tests, the system was still operating in a satisfactory manner.

of the floor." He found that "[t]he programming . . . [and] . . . performance times were all within industry standards."

John A. Miller was called as an expert witness by USE. He testified that he has been involved in the elevator business since 1935. Counsel for Reminc, alluding to testimony given earlier by Langelotti, asked Miller on cross-examination whether a purported oscillation of between six and eight inches by the elevator cars during floor leveling operations at landings constituted acceptable system performance. Miller indicated that such system performance, if true, would be totally unacceptable. However, based upon his examination of the system, Miller stated:

> "I cannot believe under any circumstances this car could bounce as this has been described, six inches. Once the brake sets, the car remains stationary. It may oscillate a quarter of an inch or a half of an inch when the brake is set, but it is not going to bounce six inches and then drop down or bounce three inches below and then come back up again."

Miller gave testimony pertaining to the installation of overhead steel in the elevator system. The steel required for the overhead beams was originally intended to carry "overhead sheaves on shelf angles bolted through the concrete at the top of the hoist way." However, Miller testified that these specifications were changed by the structural engineer because the concrete at the top of the hoist way was not strong enough to carry the weight required of it if only shelf angles were used.

USE, in its examination of Miller, made reference to Section 1.11(A) of Plaintiff's Exhibit 12 "Section 14200 Elevators." Under the heading "Work Not Included By Elevator Contractor", Miller stated that "supports under the elevator beams" were included in this category. Such work was to be provided by the general contractor for the project. In a letter addressed to counsel for USE, dated May 7, 1976, and admitted into evidence, Miller concludes:

> "This is standard practice in the elevator industry, simply because either structural steel or re-

enforced concrete hoistway construction is always part of the general building construction...."

. . . .

"Consequently, it is our opinion that the architect, Mr. Robert C. Smith, was negligent in failing to properly specify, detail and supervise the hoistway construction.... Therefore the cost of the additional steel beams and rods at the roof level needed to safely carry the loads of the sheave beams should not be assessed against [USE] and that they should be reimbursed for this cost."

Miller calculated that "the cost of the extra steel and rods installed would be. . .$12,800.00" and indicated that he found the elevator system in the Xerox Building "to be in compliance with the specifications and [that it met] the requirements of the Elevator Safety Code."

A review of all the evidence indicates that USE has established its work was completed according to the terms and specifications of the contract. Robert Calhoun Smith, the architect for the Xerox Building, certified the final payment and indicated that "[t]he elevator appear[ed] to be installed in accordance with the manufacturer's recommendation and shop drawings."

As to the completion of the installation in a workmanlike manner, there is considerable and conflicting testimony as to the proper functioning of the elevator cars and, in addition, the degree or existence of any so-called "bounce" of the cars when they stopped at the various floors.

In reviewing the evidence the Court finds the testimony of Evans L. Morrison and John A. Miller to be highly persuasive. Morrison, for instance, testified that he conducted extensive testing of the elevator system at the Xerox Building. In his expert opinion, Morrison concluded that as the releveling mode for the elevators was no more than one-half inch to one inch, there was no evidence of a releveling problem (*i.e.*, no appreciable "bounce"). Both Morrison and Miller agreed that in

their opinion, as experts, the elevator system conformed to the terms and specifications of the contract. Miller concluded:

> "I cannot find any way that I would consider this [bounce] to be excessive considering the fact that this is a basement machine and has twice the normal hoist rope that an overhead machine would have."

The Court is of the view that Reminc was unable to satisfactorily refute the evidence put forth by USE. Particularly noteworthy is the testimony given by one witness for Reminc, Charles Calderone. Calderone acknowledged that he had reviewed letters from Montgomery Elevator Company and Otis Elevator Company which stated, in effect, that they would not, in good conscience, place a bid on a basement operation because Reminc's "no bounce" requirement could not be met. Calderone's own testimony is clear that he voiced no objection to the conclusions arrived at by Montgomery and Otis. Furthermore, the fact that the replacement contractor for USE, Westinghouse, chose an overhead operation implicitly demonstrates the impossibility of producing a "bounce-free" basement operation.

An objective overview of all the evidence would indicate that the elevator cars were functioning within acceptable limits, taking into account use by the construction crews and other outside factors. The Court must, therefore, conclude that the work was done in a workmanlike manner and, accordingly, finds that USE is entitled to recover the balance owing to it under the contract—$125,143.09. Inasmuch as USE did not commit a breach of contract, the Court finds further that USE is relieved of any and all obligations as the principal under the dual-obligee bond with American.

The Court next examines Reminc's counterclaim which alleges that the design, construction and installation of the elevator system were materially defective resulting in damages both in terms of remedial work and to its business.

The evidence in a suit for breach of a construction contract must establish the existence of a contract between the parties to the suit, "the specific provisions breached, *the facts constituting*

the breach, and the amount of damages resulting to [the movant] from such breach." [Emphasis in original.] *Cantrell* v. *Woodhill Enterprises, Inc.,* 160 S.E.2d 476, 481 (N.C. 1968).

With respect to remedial defects, the general rule is that the proper measure of damages is usually "based on the market price of completing or correcting the performance and this will generally be shown by the cost of getting the work done or completed by another person." 3A Michie's Jur., *Building Contracts,* §30 (1976 Replacement.).

It is also established that a defendant must plead a counterclaim in order for him to benefit from it. *McGowan* v. *American Pressed Tan Bark Company,* 121 U.S. 575 (1887), and that the party asserting a claim by way of a counterclaim "has the burden of establishing such claim," 20 Am. Jur. 2d, *Counterclaim, Recoupment, Etc.,* §152 (1965).[11]

The defendant must file a definite statement of claims with notice of it to the plaintiff. *Dermott* v. *Jones,* 64 U.S. (How.) 220 (1860). In an exhibit appended to the Pre-Trial Order in this proceeding, Reminc set forth certain itemized damages[12], whereby it seeks to recover damages to its business and to

---

[11] It is recognized in Virginia that a party need not establish the existence of damages with mathematical precision. Rather, evidence sufficient to prove damages need only be established to a reasonable certainty or a reasonable probability. Thus, facts in a particular case must be such as to allow a reasoned and well-informed estimate of the amount of damages or loss sustained. *Holz* v. *Coates Motor Co.,* 147 S.E. 2d 152 (Va. 1966); *see Stevens* v. *Abbott, Proctor and Paine,* 228 F.Supp. 836 (E.D. Va. 1968).

[12] 1. Fees paid to Professionals and Contractors for remedial work:

a.	Grigg, Wood and Browne, A.I.A.	$12,037.75
b.	KCE Structural Engineers	6,453.84
c.	Shefferman & Bigelson	2,584.99
d.	Syska & Hennessy	21,880.35
e.	Smith, Segretti & Tepper, A.I.A.	4,281.00
f.	The George Hyman Construction Co.	8,236.00
2.	Diminution in Value of Elevator System (Westinghouse cost of repair)	520,000.00
3.	Increased Maintenance Expenses (Westinghouse Elevator Co.)	88,404.00

(footnote continued)

marketability of office space; as well as damage to its position in negotiations with building tenants. These are essentially claims for loss of profits. Reminc also seeks to recover damages for the loss of rents and/or use of rent funds. Although this claim too devolves to an alleged loss of profits, thus falling within the purview of the Court's adoption of the ruling in *Mullen* v. *Brantley*, 195 S.E.2d 696 (Va. 1973) (discussed *infra*), it will be considered separately.

The business conducted by Reminc consists of the operation of an office building where space is rented to tenants. The Court determined at trial that any assessment of damages, under a loss of profits theory, will be deemed speculative and, as such, not reasonably ascertainable when the allegedly injured party's business is new. Reminc seeks to establish a loss of profits theory for recovering damages through the testimony of Theodore Gould, a general partner of Reminc. Gould testified that of about 290,000 square feet of rentable space Xerox had rented about 203,000 square feet and a Pennsylvania firm had rented about 7,000 square feet. Thus, about one-third of the available rental spece was unoccupied. Xerox and the Pennsylvania firm were the building's first tenants.

The Court relies principally upon a recent decision by the Virginia Supreme Court, *Mullen* v. *Brantley, supra,* in precluding the admission of evidence by Reminc under a loss of profits theory. The *Mullen* court did recognize that under certain circumstances an *ongoing* business with an *established* earning capacity may enter into evidence its records of prior and subsequent business in the absence of any other practical method by which to reach an intelligent estimate of damages caused by a disruption of the business. However, where the business is new or of recent establishment:

(footnote continues)

4.	Loss of Rents and/or Use of Rent Funds	120,000.00
5.	Damage to Business and to Marketability of Office Space	400,000.00
6.	Damage to Owner's Position in Negotiations with Building Tenants	320,000.00

> "[T]he rule is not applicable for the reason that such a business is a speculative venture, the successful operation of which depends upon future bargaining, the status of the market, and too many other contingencies to furnish a safeguard in fixing the measure of damages."

Mullen Brantley, supra, 195 S.E.2d at 700.

In addition, the *Mullen* court held that the "proper measure of damages could not be based upon loss of anticipated profits from an established business." *Id.*

The facts in the instant case clearly fall within the well-reasoned ruling of *Mullen* v. *Brantley, supra,* and, accordingly, the Court must deny the claim for damages based upon Reminc's loss of profits argument.

Reminc next asserts a claim for interest on the loss of the use of rent funds withheld by Xerox. Reminc acknowledges that although Xerox ultimately paid back the back rent is withheld, it did not pay interest on the funds so withheld.

Gould testified that the rent funds were "placed in the hands of Chicago Title as an escrow agent [in the amount of $892,000.00] and the funds were disbursed specifically against the accomplishment of the milestones in the remedial construction" in the Xerox Building. The back rent, according to Gould, had accrued between "June or July of 1975, to October of 1976." No testimony was elicited from Gould as to why interest was not paid from the funds withheld by Xerox, although he did testify that the prevailing interest rates during the period in question were between eight and eleven percent.

On cross-examination, Gould acknowledged his earlier testimony in *1616 Reminc Limited Partnership* v. *Atchison and Keller,* No.75-659-A (Bkrtcy. E.D. Va. November 14, 1979), wherein he testified that:

> "No space was leased until the mechanical system was completed and in operation, we entered into new leasing for the remainder of the vacant space.
>
> . . . .

"During the period of 1976, it was impossible to lease space in the Xerox Building because of its construction defects. The principal problem was lack of heating and air conditioning. The air conditioning wasn't as bad as the heating problem.

. . . .

"The reason that they stopped paying rent was because the heating system had not worked during the winter and the attempts to remedy the construction defects had not been successful."

Joseph Fisher, Manager of Facility Planning and Administration Building, and Manager of the Xerox Building for Xerox, testified that his duties included the handling of "leasehold improvements, customer [and] individual complaints with the Xerox tenants in the building [and] handl[ing of] office service functions and personnel." He testified that HVAC (i.e., heating, ventilating and air conditioning) problems, leakage problems, and the elevator system were all contributing factors in Xerox's decision to withhold rent. However, Fisher candidly acknowledged that the decision to withhold rent was not his but "was made through Vice Presidential levels up through Corporate Headquarters." No testimony was elicited from any witness pertaining to what extent (or even a percentage figure) Xerox determined that the elevator, heating and air conditioning, and leakage problems acted as contributing factors in its decision to withhold rent.[13]

The Court is unable to ascertain with any reasonable certainty what USE's pro-rata share would be of the interest lost on the Xerox funds withheld from Reminc and placed in escrow. Nor can the Court fashion an award when the record upon which a decision must be based would require conjecture or unsubstantiated estimates as to what such an award for damages should be.

---

[13] Reminc did attempt to elicit such information from Fisher. However, as he had testified earlier that all decisions were made at higher management levels in Xerox, the Court sustained USE's objection to his testimony on this issue.

Reminc also seeks to recover a claim for damages allegedly caused by increased maintenance expenses. USE interposed an objection to Reminc's line of questioning on the grounds that resolution of this issue was properly one for another action based upon a breach of USE's maintenance contract with Reminc.

Rule 713 of the Rules of Bankruptcy Procedure provides that "Rule 13 of the Federal Rules of Civil Procedure [counterclaim] applies in adversary proceedings." In *United States* v. *American National Bank and Trust Company of Chicago*, 443 F.Supp. 167 (N.D. Ill. 1977), the court held that under F.R.Civ.Proc. 13(a), the same transaction or occurrence test should be given liberal interpretation. Accordingly, the Court finds that Reminc's line of questioning on the issue of increased maintenance expenses was proper as applied under Rule 713 of the Rules of Bankruptcy Procedure.

Gould testified that Reminc terminated its maintenance contract with USE because of unsatisfactory maintenance of the elevator system and Reminc's inability to properly assess the alleged defects in the elevator system while USE continued its maintenance program under the contract. He testified that while Reminc was paying USE $1,592.00 per month prior to termination of the maintenance contract, it has been paying Westinghouse $3,210.00 per month under a new maintenance agreement. Gould estimated that as construction on a new elevator system would not be completed until June of 1980, the Westinghouse maintenance contract on the currently operating elevator system would continue until then.

The Court has examined the Maintenance Contract entered into between USE and Reminc, dated July 5, 1974, and the Maintenance Contract entered into between Westinghouse and Reminc, dated October 31, 1976. The terms and conditions in both contracts are almost identical as to the types of service provided by USE and Westinghouse to Reminc. The Court notes that neither contract provides a breakdown of monthly maintenance rates. For example, the record before the Court is silent as to the number of man hours employees of Westinghouse were to expend under its contract with Reminc.

No log entries or other pertinent records are before the Court from which a rational basis could be formed for determining why Westinghouse's monthly maintenance rate was approximately twice that of USE's maintenance rate.

The Court takes cognizance of a price-adjustment clause in the Westinghouse contract which allows for an increase or decrease in the monthly rate dependent upon the "percentage of increase or decrease in the latest available wholesale Metals and Metal Products index." As many sectors of the national economy have in recent years witnessed inordinately large increases in prices of raw materials and finished products due to inflationary pressures, it is reasonable to believe that this may be one cause for the higher Westinghouse maintenance rate. Whatever the cause or causes may be, the Court will not speculate on the issue of damages when an adequate basis for compelling USE to pay the difference in the contract prices has not been established by Reminc. Accordingly, the Court finds that Reminc has not established that the amount paid to it in excess of the rate charged by USE is due specifically to acts or omissions by USE under the terms and conditions of the latter's maintenance contract with Reminc.

Reminc also seeks to establish that it is entitled to damages on the basis of certain fees allegedly paid to various professionals and contractors for remedial work. Reference is made to six firms which allegedly performed remedial work on the elevator system. One of these firms, Shefferman and Bigelson, according to Gould's testimony, never gave any advice on the elevator system.

Having examined the record, the Court is unable to determine any proper basis for the alleged damages due to Reminc by virtue of remedial work undertaken by firms alluded to by it. Reminc did file an exhibit which purports to be an hourly service report from one of the firms, Grigg, Wood and Browne, A.I.A. However, this exhibit was not admitted into evidence. Accordingly, in the absence of appropriate testimony or other evidence to substantiate its claim for damages on this issue, the Court must deny Reminc's claim. (*See* Note 11(1)(a) - (f), *supra* at 24.)

Reminc next asserts that it is entitled to recover damages in the amount of $520,000.00 for the alleged cost of the Westinghouse repair operation on the elevator system. In support thereof, Reminc offered into evidence a report submitted by W.F. Garrahan, District Marketing Manager for Westinghouse, dated January 25, 1977. Garrahan acknowledged that the report was a summary of other persons' opinions, and that he was not competent to give technical opinions which the report purports to do. The Court declined to admit this exhibit (Defendant's Exhibit "ZZ") into evidence.

Reference was made to a proposal Garrahan submitted on behalf of Westinghouse to Reminc for the rehabilitation of the elevator system in the Xerox Building (Defendant's Exhibit "AAA"). USE objected to the introduction of this exhibit on the grounds that Garrahan was unsure whether the proposal conformed with USE's original specifications, and that he was unsure how the various figures referred to in the proposal were formulated. The proposal itself did not give an item-by-item breakdown except for three line items in the amounts of $18,170.00; $8,525.00; and $370,954.00. No testimony was given which would assist the Court in determining the reasonableness and propriety of these sums of money for rehabilitation of the elevator system. The Court permitted the admission of the exhibit solely as "a submission of price prepared with evidence received from others" which was merely compiled by Garrahan.

In conjunction with Defendant's Exhibits "ZZ" and "AAA", the Court finds Garrahan's testimony on this issue to be insufficient to properly establish the claim of Reminc. Therefore, the Court finds that Reminc is not entitled to damages based upon the purported cost of the Westinghouse rehabilitation effort.

Accordingly, having reviewed all the evidence pertaining to Reminc's counterclaim, the Court must conclude that all claims alleged therein by Reminc be denied.

The evidence, including the testimony of Jenkins as well as Miller, establishes that the balance due on the contract to USE is $125,143.09. Accordingly, judgment will be rendered for

USE in the amount of $125,143.09, and the counterclaim of Reminc will be denied.

An appropriate order will enter.

Dated at Alexandria, Virginia, this 23rd day of February, 1981.

Martin V. B. Bostetter, Jr.
United States Bankruptcy Judge

Certified copies to:

H. BRADLEY EVANS, JR., ESQUIRE
Counsel for Plaintiff, United
States Elevator Corporation
122 South Royal Street
Alexandria, Virginia 22313

JAMES A. NEWELL, ESQUIRE
Counsel for Defendant/Debtor-
in-Possession
Suite 101
1616 North Fort Myer Drive
Arlington, Virginia 22209

United States Bankruptcy Court

FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

In Proceedings for a
Real Property Arrangement
No. 75-659-A

IN THE MATTER OF:

1616 REMINC LIMITED PARTNERSHIP
Debtor-in-Possession

UNITED STATES ELEVATOR CORPORATION
Plaintiff

v.

1616 REMINC LIMITED PARTNERSHIP
Defendant

ORDER

At ALEXANDRIA, in said District, this 23rd day of February, 1981.

In accordance with the Memorandum Opinion entered herein on the 23 day of February, 1981, and for the reasons set forth therein, IT IS

ORDERED, that United States Elevator Corporation be, and hereby is, awarded judgment in the amount of $125,143.09, with interest at the rate of eight percent (8%) from the date hereof; and it is further

ORDERED, for the reasons set forth in the Memorandum Opinion, that the Complaint filed by 1616 Reminc Limited Partnership against The American Insurance Company, a proceeding consolidated with the instant case, be, and hereby is, dismissed with prejudice; and it is further

ORDERED, that the United States Elevator Corporation is relieved of any and all obligations as the principal under the dual-obligee contract bond with The American Insurance Company, as surety; and it is further

ORDERED, that the counterclaim of 1616 Reminc Limited Partnership be, and hereby is, denied.

Martin V. B. Bostetter, Jr.
United States Bankruptcy Judge

United States District Court

FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

In Proceedings For An Arrangement Under Chapter XII of the Bankruptcy Act Number 75-659-A

IN THE MATTER OF:

1616 REMINC LIMITED PARTNERSHIP
D/B/A XEROX BUILDING
Debtor-in-Possession

UNITED STATES ELEVATOR CORPORATION
Complainant

VS.

1616 REMINC LIMITED PARTNERSHIP

LARWIN MORTGAGE INVESTORS, A California Real Estate Investment Trust, a/k/a LMI Investors
HARVEY B. COHEN, Substitute Trustee
DAVID E. SHER, Substitute Trustee
WILLIAM L. STAUFFER, JR., Substitute Trustee

METROPOLITAN LIFE INSURANCE COMPANY
JAMES E. MILLAR, Surviving Trustee
JAMES C. BRANTLEY, Surviving Trustee
Defendant

AMENDED COMPLAINT TO DETERMINE INDEBTEDNESS AND OTHER RELIEF

COMES NOW United States Elevator Corporation, a duly listed creditor herein and respectfully states as follows:

1. United States Elevator Corporation is a corporation duly qualified to do business in the Commonwealth of Virginia.

2. The debtor herein has filed a Petition for Arrangement under Chapter XII of the Bankruptcy Act and has listed United States Elevator as a secured creditor.

3. Larwin Mortgage Investors (a/k/a LMI Investors), Metropolitan Life Insurance and their respective trustees named above were sued only as their interest may appear.

4. Prior to the institution of this bankruptcy proceeding and thereafter with leave of Court, the complainant herein caused to be recorded among the land records of Arlington County a Memorandum of Mechanics Lien signed by subcontractor which is duly recorded in Deed Book 1881 at Page 448 in the amount of $112,343.09.

5. Attached hereto as Exhibit 1 is a Bill of Complaint to Enforce Mechanics Lien filed United States Elevator Corporation vs. Arlington Auto Sales, et al. which was filed on or about July 11, 1975, in the Arlington Circuit Court and assigned Chancery Number 25547.

6. Each and every allegation in the attached Exhibit 1 together with all exhibits incorporated by reference therein are incorporated by reference in this pleading. United States Elevator requests an answer to each such incorporated allegation and exhibit.

7. Thereafter, with leave of this Bankruptcy Court, United States Elevator caused a Memorandum of Mechanics Lien to be filed in Deed Book 1898 at Page 422, and shortly thereafter filed a Bill to Enforce the supplemental Mechanics Lien in the amount of $184,000.00.

8. Attached hereto as Exhibit 2 is a true copy of the pleadings filed in the Arlington Circuit Court concerning same.

9. With reference to Exhibit 2, United States Elevator incorporates by reference each and every allegation and exhibit and requests an answer to each such allegation and exhibit.

10. Prior to the filing of these memoranda of mechanics liens, Citcon Corporation (hereafter referred to as the contractor) entered into a subcontract dated March 16, 1973, with United States Elevator Corporation to install two hydraulic and

six electric elevators on the premises known as 1616 North Fort Myer Drive, Arlington, Virginia.

11. The elevators were installed.

12. The work has been accepted by the owner and the contractor.

13. Despite demand, there remains due and owing to United States Elevator Corporation under the contract and for extras performed the sum of $296,343.09 plus interest and costs.

WHEREFORE, United States Elevator Corporation prays: for an adjudication that the debt is a legitimate obligation of the debtor herein; for a judgment in the amount of $296,343.09 plus interest and costs; for inclusion in the debtor's plan of arrangement under the same terms and conditions as the debtor's other mechanics liens creditors; for validation of its mechanics lien rights; and for such other further relief as to the Court may seem just and which the nature of the cause may require.

UNITED STATES ELEVATOR
CORPORATION
By Counsel

EVANS AND ECONOMOU

By_____
H. Bradley Evans, Jr.
Counsel for Complainant

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Amended Complaint been mailed this 9th day of July, 1976, to Rust, Rust, and Pratt, P.O. Box 537, Fairfax, Virginia 22030, and to Robert M. Musselman, 413—7th Street, N.E., P.O. Box 254, Charlottesville, Virginia, 22901.

H. Bradley Evans, Jr.

IN THE

United States District Court

FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Chapter XII
No. 75-659-A

IN RE:

1616 REMINC LIMITED PARTNERSHIP,
Debtor

UNITED STATES ELEVATOR CORPORATION,
Complainant

v.

1616 REMINC LIMITED PARTNERSHIP, *et al.*,
Defendants

DEFENSES, ANSWER AND COUNTERCLAIM

Comes now 1616 Reminc Limited Partnership, Debtor and Defendant herein, by counsel, and responds to the "Amended Complaint to Determine Indebtedness and Other Relief" filed herein by United States Elevator Corporation as follows:

SPECIFIC DEFENSES

As assignee of the rights of LMI Investors against the said claimant, which assignment was made on May 1, 1976 as a part of the Debtor's Plan of Arrangement, the Debtor adopts and incorporates herein as specific defenses the "Objection to

Classification and Allowance of Claims Filed Pursuant to Alleged Mechanics Liens Together With Counterclaims Against Said Claimants", as it applies to United States Elevator Corporation which was filed in this Chapter XII proceeding on or about January 27, 1976 by Metropolitan Life Insurance Company *et al.* and which LMI Investors adopted as its own pleading by Order of this Court dated February 10, 1976.

ANSWER TO AMENDED COMPLAINT

1. Paragraph 1 of the Amended Complaint is neither admitted nor denied, but strict proof thereof is demanded.

2. Paragraph 2 of the Amended Complaint is admitted with the clarification that the Debtor's schedules contain a notation that the Debtor contests the validity of the Complainant's lien and the amount thereof.

3. Paragraph 3 of the Amended Complaint is neither admitted nor denied, but strict proof thereof is demanded.

4. Paragraphs 4 and 5 of the Amended Complaint are admitted.

5. As to Paragraph 6 of the Amended Complaint, the following response is made to the numbered paragraphs of "Exhibit 1" incorporated by reference in the Amended Complaint:

a. Paragraph 1, of "Exhibit 1" is admitted.

b. As to paragraph 2 of "Exhibit 1", Debtor admits that it is the long term lessee of the property stated; otherwise the said paragraph is neither admitted nor denied, but strict proof thereof is demanded.

c. As to paragraph 3 of "Exhibit 1", it is admitted that the said defendants James E. Miller, Lowell H. Moran and James C. Brantly are named as trustees in the Deed of Trust referred to; otherwise the said paragraph is neither admitted nor denied, but strict proof thereof is demanded.

d. Paragraph 4 of "Exhibit 1", is admitted.

e. Paragraphs 5 and 6 of "Exhibit 1" are denied.

f. As to paragraph 7 of "Exhibit 1", Debtor admits that it received the document marked "Exhibit D", other-

wise the said paragraph is neither admitted nor denied, but strict proof thereof is demanded.

g. Paragraphs 8, 9, 10 and 11 of "Exhibit 1" are denied.

6. Paragraph 7 of the Amended Complaint is admitted but the validity or any purported lien is denied.

7. Paragraph 8 of the Amended Complaint is admitted.

8. As to Paragraph 9 of the Amended Complaint, the following response is made to the numbered paragraphs of "Exhibit 2" incorporated by reference in the Amended Complaint:

a. Paragraph 1 of "Exhibit 2" is admitted.

b. As to paragraph 2 of "Exhibit 2", it is admitted that your Debtor is the long term lessee of the property referred to, that Theodore B. Gould is a general partner of your Debtor. It is denied that Robert E. Morrison is a general partner of the Debtor and that Gerald O'Donnell is currently the receiver for Debtor; otherwise, the said paragraph is neither admitted nor denied, but strict proof thereof is demanded.

c. As to paragraphs 3, 4, 5, 6, 7, 8, 9, 10 and 11 of "Exhibit 2", your Debtor restates the responses set forth above in paragraphs 5c, 5d, 5e, 5f and 5g of this Answer, except that the words "Exhibit 2" are to be substituted for the words "Exhibit 1".

9. Paragraph 10 of the Amended Complaint is admitted except that your Debtor further sets forth that the said agreement speaks for itself.

10. Paragraphs 11, 12 and 13 of the Amended Complaint are denied.

11. Any allegation not specifically admitted or otherwise addressed above is to be deemed denied.

WHEREFORE, 1616 Reminc Limited Partnership prays that the Amended Complaint filed herein against it be dis-

missed, that the Complainant recover nothing, and for such other and further relief as this Court may deem just.

COUNTERCLAIM

Comes now your Debtor and Defendant herein, 1616 Reminc Limited Partnership, by counsel, and requests that this Court grant it affirmative relief, respectfully alleging as follows:

1. On or about December 14, 1972, Debtor and Defendant 1616 REMINC LIMITED PARTNERSHIP ("REMINC") and Defendant LMI Investors, ("LMI"), for good and valuable consideration entered into a written agreement wherein and whereby LMI agreed to lend to Defendant REMINC an aggregate amount not to exceed the sum of $12,950,000 for construction by Reminc of a commercial office building located at 1616 North Fort Myer Drive, Arlington County, Virginia, which building is commonly known as the "Xerox Building" (the "Building"). Such loan was evidenced by two promissory notes of Plaintiff REMINC secured, *inter alia*, by two deeds of trust on the Building and other related property of Reminc in favor of LMI as beneficiary.

2. On or about February 1, 1973, Reminc and CITCON Corporation ("Citcon"), a Maryland corporation, doing business in Virginia, for good and valuable consideration entered into a contract wherein and whereby Citcon, as general contractor, agreed to undertake, manage and complete the construction of the Building in accordance with certain plans and specifications prepared by Robert Calhoun Smith, A.I.A. (the "architect").

3. On or about March 16, 1973, Citcon, as general contractor, for good and valuable consideration, entered into a subcontract with Plaintiff United States Elevator Corporation (the "Subcontract"), wherein and whereby for a contract price of Four Hundred Fifty-Nine Thousand Dollars ($459,000.00) United States Elevator Corporation ("ELEVATOR"), as subcontractor, agreed to furnish all labor, material and equipment necessary to satisfactorily complete in accordance with the

contract drawings and specifications of the architect, certain specified elevators, corner posts and side openings, hydraulic elevators, excavation and hoisting. A copy of the Subcontract between Citcon and Plaintiff ELEVATOR is attached hereto as Exhibit "A" and is incorporated herein by reference.

4. Pursuant to Article 7 of the Subcontract, Citcon was given the option to require Defendant ELEVATOR to furnish a performance and payment bond. And on or about June 8, 1973, Defendant ELEVATOR as Principal and The American Insurance Company ("AMERICAN") as Surety, issued a dual obligee contract bond to REMINC and LMI in the amount of Four Hundred Fifty-Nine Thousand Dollars ($459,000.00), to cover the faithful performance of the duties of ELEVATOR pursuant to the Subcontract. The dual obligee Contract Bond (referred to hereinafter as "the Bond") is attached hereto as Exhibit B, and is incorporated herein by reference.

5. By agreement dated May 1, 1976, as a part of the Debtor's Plan of Arrangement, LMI, for good and valuable consideration, assigned its rights as against Defendant ELEVATOR and its rights under the Bond to Defendant REMINC and REMINC files this Counterclaim in its own right and as assignee of LMI.

6. Notwithstanding Plaintiff ELEVATOR'S obligation pursuant to the Subcontract to furnish all labor, material and equipment necessary to satisfactorily complete its contracted work in accordance with the contract drawings and specifications of the architect, Plaintiff ELEVATOR has breached its contractual obligation under the Subcontract and the Bond and is in default thereon, *inter alia*, in the following respects:

a. By failing to perform the subcontract work in strict accordance with the contract drawings and specifications of the architect;

b. By providing and using inferior and defective workmanship;

c. By failing to complete the work which it contracted to perform.

6. REMINC and its co-obligees have performed all of the conditions precedent on their part to be performed with respect to the Subcontract and the Bond; and REMINC, by reason of the wrongful failure and refusal of the Plaintiff ELEVATOR to complete the work as contracted for and otherwise to comply with the Subcontract and the Bond, has suffered direct and substantial damage, which damage includes the aggregate amount necessary to undertake and complete the remedial construction necessitated by Plaintiff's breach of its contractual agreements, as well as other substantial expenses and consequential damages which Defendant REMINC has been compelled to incur and suffer in order to protect its interests in the Building and as a result of the aforesaid breaches.

WHEREFORE, Defendant and Counterclaimant 1616 REMINC LIMITED PARTNERSHIP demands judgment against Plaintiff UNITED STATES ELEVATOR CORPORATION in the amount of Four Hundred Fifty-Nine Thousand and No/100 Dollars ($459,000.00) plus whatever additional damages and expenses are proven at trial to have been incurred as the result of Defendants' breaches, as aforesaid, plus costs, interest and attorneys' fees.

Respectfully submitted,

1616 REMINC LIMITED PARTNERSHIP

By _____ JAMES A. NEWELL
Counsel

ROBERT M. MUSSELMAN
RONALD L. NESTER
JAMES A. NEWELL
413 Seventh Street, N.E.
Charlottesville, Virginia 22901
Counsel for 1616 Reminc Limited Partnership

CERTIFICATE

I hereby certify that copies of the foregoing Defenses, Answer and Counterclaim were mailed, postage prepaid, this 2nd day of August, 1976 to H. Bradly Evans, Jr., Esq., 122 South Royal St., Alexandria, Va., Counsel for United States Elevator Corporation, and John H. Rust, Esq., 4009 Chain Bridge Road, Fairfax, Va. 22030.

JAMES A. NEWELL

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRIGNIA

ALEXANDRIA DIVISION

In Proceedings For An Arrangement Under Chapter XII of the Bankruptcy Act Number 75-659-A

IN THE MATTER OF:

1616 REMINC LIMITED PARTNERSHIP
Debtor-in-Possession

UNITED STATES ELEVATOR CORPORATION
Complainant

-vs.-

1616 REMINC LIMITED PARTNERSHIP, *et al.*
Defendants

MOTION

United States Elevator Corporation, by counsel, conditionally moves this Court as follows:

1. In the event that it is determined that United States Elevator Corporation does not have an enforceable right as a mechanics lienor when the matter is argued on January 25, 1977, this Court is respectfully moved to treat the Amended Complaint as a proceeding under Rule 12-30 of the Rules of Bankruptcy Procedure such that United States Elevator will be treated as an unsecured creditor of the debtor herein and paid in accordance with the Plan of Distribution for such classification of creditors.

2. In its Amended Counterclaim against United States Elevator Corporation, the debtor incorporated as Exhibit "D"

an assignment from Citcon Corporation (the general contractor on the debtor's property) to 1616 Reminc Limited Partnership.

Hence, the debtor has assumed the rights and liabilities of Citcon Corporation under its contract with United States Elevator Corporation for installation of eight elevators in the debtor's premises.

UNITED STATES ELEVATOR
CORPORATION
By Counsel

EVANS AND ECONOMOU

By H. BRADLEY EVANS, JR.

H. Bradley Evans, Jr.
Counsel for Complainant

CERTIFICATE OF SERVICE

I, H. Bradley Evans, Jr., hereby certify that I caused the foregoing Motion to be delivered by courier to John J. Rust, Jr., 4009 Chain Bridge Road, Fairfax, Virginia 22030, and to James A. Newell, P.O. Box 254, Charlottesville, Virginia 22902, this 20th day of January, 1977.

H. BRADLEY EVANS, JR.

H. Bradley Evans, Jr.

ASSIGNMENT OF RIGHTS OF ACTION

FOR VALUE RECEIVED the undersigned Citcon Corporation, a Maryland, corporation, hereinafter referred to as Citcon, does hereby sell, assign, grant, transfer, convey and set-over to 1616 Reminc Limited Partnership, a Virginia limited partnership, hereinafter referred to as Reminc, any and all rights of action upon claims, known or unknown, which Citcon had or now has or hereinafter may have against any individual or entity which, prior to the date hereof, performed construction labor or supplied construction materials on or for that certain real property and the improvements thereon commonly known as 1616 North Fort Myer Drive, Arlington County, Virginia, which rights of action and claims result from, arise out of, relate to, or are based upon the performance of non-performance of such individuals or entity, prior to the date hereof under contract or subcontract to perform construction labor and/or to supply construction materials on or for the said property, including any and all rights of action and claims against bonding companies upon performance bonds relating to such contracts or subcontracts.

IN WITNESS WHEREOF, Citcon has duly executed this Assignment this 6th day of August, 1976.

CITCON CORPORATION

By (Signature Illegible)

ACCEPTED BY:

1616 REMINC LIMITED PARTNERSHIP

By (Signature Illegible)

General Partner

October 13, 1975

MEMO

TO: Lloyd Martin

FROM: Bill Cork

SUBJECT: Trip to Washington DC
Xerox Building
1616 North Fort Myer Drive
Rosslyn, Virginia
Job #079-004-0040, Elevator #6404/09

During my visit, I found three major problems with this job. Listed in the order of Passenger/Customer complaints, they were:

1. Cars bounce severely at the floor
2. Cars frequently go into the final limits
3. Cars not handling the traffic due to multiplex problems and slow floor to floor times

In addition to the big problems, several minor problems were present. We have suffered several SSD-1 failures. VIP's have independent service keys and take the cars out of service for their personal use. On-going construction takes the cars out of service to haul tools and material. The lobby hall lanterns are lighted only about half the time; this was irritating to the building passengers and they were saying the whole elevator system was fouled up and the lanterns were proof! The load switches needed constant adjustment; they were finally disabled, rather than have them give inaccurate information to the system.

Regarding the car bouncing at the floor, this is the worst problem and it is still present. This job has basement traction machines and 19 landings. We have over 600 feet of hoist rope. The cars are roped with only 6½" diameter ropes; the ropes are far too elastic.

The cars can be parked level with the lobby floor; when about 9 to 10 people enter, the car relevels. The ropes have just

stretched the ½" necessary to cause releveling. At any landing, I can get the car bouncing ½" above the below the floor by pressing about half my weight on the car sill.

The long rope problem was made worse because the field man had not tensioned the rope. All shackle nuts were on the cotter pins, and no equalizing springs were used. I recognize we feel equalizing springs are unnecessary, but the other big elevator companies do not agree with us.

The cars bounced badly on stop at any landing. This was caused by the soft stop circuit not working and the car stopping on the brake. The SR and PX relays were dropping in approximately 150 milliseconds and dropping the brake before the machine could soft stop.

The correct sequence of operation is—Lose direction and pot, kick the generator field with the soft stop capacitor, set the brake, then suicide the generator. If SR and PX suicide the generator and then drop the brake, a hard stop occurs. I changed the SR capacitor to a 40 MFD Mallory computer-grade capacitor and added an 80 MFD capacitor to the existing 30 MFD PX capacitor. This gave SR and PX enough time for soft stop to occur.

Two or three times a day, a car would go into the final limits. All cars seemed affected and it occured usually at the bottom landing. It became such a severe problem that the branch men instructed the Building Engineer on how to jumper out the final limits and get the car running again.

On my first morning, I witnessed the car being kicked into the limits by the "TMR SPIKE". I had long suspected this was a cause of limit problems, but never had the good luck to catch it. On this occasion, the car came to the lobby. The TMR coil spiked the generator triac in the SSD-1 and kicked the car down. LU relay picked, and the TMR spike kicked the car down again—onto the car buffer switch. The TMR spike happens almost each time the POT relay picks or drops. It is apparently caused by the induction of the TMR coil. Its direction and intensity, apparently, is affected by where the POT action occurs on the AC sine wave. Disconnecting the TMR coil cures the spike problem.

I reported these findings to John Taylor and Bill Hoelscher when I discovered them on the Eastgate Building in Miami. No corrective action has been taken.

After I disconnected the TMR coils on this job, no car went into the limits during the three weeks I was there. The problem was compounded by having only 3" car runby. The field crews did not cut off the car buffer stands to get their 6" runby; but, they may not have been able to do so due to low overhead clearance.

The multiplex controller was not doing an acceptable job at all! The elevator cars were bunched together and chasing the same calls. Both the top and bottom of the building were starved for cars (the middle of the building was largely un-occupied). The 5th floor (2nd landing) is a very busy landing because it is a rear street entrance and also has the coffee shop. However, the P-1 zone was usually unassigned. I spent a good deal of my time watching the multiplex and made several changes after I had adjusted every multiplex timer.

Most of the chasing was caused by a circuit that had been added (see Drawing #1). Any time the LPK relay picked, all cars not going down were dispatched. This would starve the lobby and sent most of the cars to late hall calls at the top of the building. A Lobby hall call would then time out TLC-1 and TLC-2, drop all zone assignments, and send all cars to the lobby. I removed the contact wires on LPK-3 and LPK-4 to deactivate this circuit.

I moved the DSA-1 N.O. contact to below the PKTX contact. Prior to this change, DSA could not dispatch a car unless four cars were out of service or a hall call was above the lobby. This change has been incorporated on the latest multiplex revision.

The LBU relay would only pick momentarily, unless there was a late hall call above the lobby. I moved the SUA-a-1 contact to 4X to hold an LBU until the car loses SUA. This change permits the car to see a call that becomes late while it is still traveling up. It also ties the car into an empty zone through the new back contacts on PKT, PKZ, and PK1.

TCUC and TCUX would "doorbell" on occasion. This prevented dispatching any car. It is caused by TCUX being picked by a TCUC contact and TCUC being dropped by a TCUX back contact. I removed the TCUX timer module and the TCUC stick contact (TCUC 1 N.O.) Now TCUC picks and stays picked until the dispatched car reaches the 5th floor (2nd landing). If a car is held at the lobby by loading passengers, etc., DSA will dispatch another car in about 30 seconds.

The multiplex system was originally designed for a 4 car-4 zone system. It was then reduced for a 3 car-3 zone system, but nothing was added to the 4 car system to make a 6 car system. The zone assignments and lobby quota are not logical. Tabulated below, is the system as it was designed.

Cars Available	Zones Assigned	Lobby Quota
6	PT, P2, P1, LB, LB, LB	4 or 5 (MEUP)
5	PT, P2, LB, LB, LB	4 or 5 (MEUP)
4	PT, P2, LB, LB	4 or 5 (MEUP)
3	PT, LB, LB	4 or 5 (MEUP)
2	LB, LB	4 or 5 (MEUP)
1	LB	4 or 5 (MEUP)

From the above chart, it is easy to see several logic errors. With only one car out of service, we have the second most important zone in this building unassigned. Further, with two cars out of service, we essentially have a 4 car-4 zone system; thus, it is logical to put one car in each zone. Dispatching is in bad trouble. With two cars out of service, it takes all the cars unassigned in order to dispatch cars to fill two empty zones. The logical arrangement is:

Cars Available	Zones Assigned	Lobby Quota
6	PT, P2, P1, LB, LB, LB	4
5	PT, P2, P1, LB, LB	3
4	PT, P2, P1, LB	2
3	PT, P2, LB	2
2	PT, LB	2
1	LB	2

Now it is easy to see that we need to know if all cars are in service, one is out of service, or two or more are out of service for dispatching purposes. We also need to know if 3, 4, or 5

cars are out of service for zone assignments. Thus, we need to know exactly how many are in (or out) of service. The controller, as designed, recognized 1 car, 3 cars and 4 cars out of service. I designed a circuit to show 1 car, 2 cars, and 3 cars out of service (Drawing #2). I changed the 3 and 4 cars out of service counters to 4 and 5, respectively. I changed the LPK counter as shown in Drawing #3. These changes made the most dramatic change in traffic handling. With proper zone assignments and dispatching, I was able to answer hall calls in less than 30 seconds with only 4 cars, except during the lunch traffic. We were unable to do this with six cars when I first saw the job.

The new circuit of PKT, PK2, and PK1 back contacts are also not logical. They only work on a car that has been dispatched to an empty zone or is going up with car calls. The new circuit tends to cause all up traveling cars to chase the top zone calls and bunch up. If another car answers the call, the P1 car loses its assignment on the way back to its zone and the up calls in that zone must be answered by a lobby car. I tried the system with the new circuit active and also disconnected for several days and noticed no improvement with at least four cars in service. (I left it connected). The added contacts would be better used in parallel with TCT, TCZ, and TC1 zone ties. This would tie an empty zone to an adjacent zone before a hall call became a late call.

If a parked car was sitting at a park landing, MG running, doors closed, and a passenger entered a hall call at that landing, the car would run one floor away, then return to answer the call. This is caused by the delay created by the capacitors in series with the UC and DC relays. SUA, SU, P, and PA can all sequentially pick before UC can pick and drop CA. The capacitor circuit was added to prevent a stuck hall button from locking up a car. However, the CAA timer also prevents this. The disadvantage (in addition to the above) is that, if a person holds the hall button for one or two seconds, the call cannot be cancelled by that car—another car must be sent to an empty landing. I jumpered the capacitors out, and this makes the UC-DC circuits the same as the CC circuit. This "fix" has been

done to every multiplex and busy duplex in the San Diego branch.

The lobby hall lanterns would not light if another car had a lighted lantern or if TCUC was still picked. Admittedly, the non-lighted car was not next up. However, with no indication in the car that it was waiting for dispatch (i.e., "not next up light"), the passengers would jerk on the safety edges to get the doors to close. After about three good jerks, DOR would time out and the doors close; thereby, proving that the elevators were fouled up and needed three jerks on the doors to get running. To eliminate some of the poison in the building, The Washington DC branch jumpered out DOR. This saved damaging the safety edges, but still did not light the hall lantern. I jumpered TCUC-1 and TCUC-2 interconnects to force on the lanterns. I also opened the TCU-1 interconnect to help the previously discussed TCUC-TCUX chatter, and to allow the dispatch of a lobby car while the basement car was stopped at the lobby on the way up.

More than one car can be assigned to the same zone. This is because several contacts were removed from the zone assignment circuit and replaced with a DSPU contact. If two or more cars are going up to answer a late call, and a zone became empty, all such cars are assigned to the empty zone before the zone lockout relay picks. This condition still exists, but is helped by the aforementioned TCUC-TCUX changes (DSPU is not picked so long).

The LBS relay is picked when the car is at the lobby on independent service. The biggest problem here is the LUD circuit will not pull the P2 car to the lobby—the lobby call must become late. I did not have a spare IND contact available, and I did not consider it enough of a problem to add relays.

A major cause of slow traffic handling was the long floor to floor times. The job was installed with a 3 lane-5 vane system. This system is not satisfactory and has been discussed in earlier meetings. We changed the elevators to a 5 lane-5 vane system to get correct slowdown logic. Several problems were encountered. There were no spare wires for the intermediate slowdown roller switches. The plant sent only half the required

vane nuts (paralled grams). The number four car is a corner post job, the hoist ropes on one side and the guide rail on the other did not give us room to mount the new sensors on the sensor can. We had to cut down the car cam, move the terminal switches and gutter, and mount the new switches atop the sensor can.

Another factor in the slow floor to floor times was the cars were leveling at 10 fpm, this was less than 5 percent of full speed and in the residual voltage range of the generator. The residual voltage can seriously affect the level speed-including stalling the car in level speed. Furthermore, valuable seconds are lost leveling the last eight inches. I raised the level speed to 18 fpm and the approach speed to about 50 fpm. This gave me good control, soft stop, and a brake-brake time of 5.5 seconds on a 10'-4" floor run. The performance time is 8.2 seconds.

The SSD-1 failures were reported to be about the same as that for the San Diego branch. They are mostly generator traic failures. If the Electronics Department does not know what kills the triacs, I sure do not. However, it appears to have something to do with spikes. The older SSD-1 jobs appear to be less prone to failure (ones without TMR, HX, and soft stop working). We get a spike big enough to drive the generator field light bulb to full brilliance almost every time Pot picks or drops. We did not blow an SSD-1 after I disconnected TMR. Another bad spike occurs each time H is dropped. At this time, the high loop voltage is connected in opposition to the triac. I temporarily opened the HX resistor, recompounded and adjusted the SSD-1. This got rid of the bump and spike when H dropped. However, the machine lag caused us to swoop to a stop. This caused three bad backlash bumps (each time loop current crossed zero). I restored the elevator to operation with the HX relay. Several years ago (before the HX circuit) Bill Hoelscher and I made many oscillograph traces to determine the optimum slowdown distances. He probably still has those traces.

Two cars answer a basement call. The hall call button places a car call in the controller. These calls are unnecessary in the present building configuration. The hydro duplex is only about

50 feet away. The effect of a basement car call is to pull the car away from its assigned zone instantly. This means a car must be dispatched from the lobby to get a call the basement car was running to. To make matters worse, passengers push both basement call buttons and call both #3 and #4. I recommend that the building be convinced that basement calls should only work when the car is on independent or fireman's service (see Drawing #4).

The load switches on this job were the same as all jobs I have seen—out of adjustment and disconnected. The load switch setting drifts to a lighter load. Soon the switches trip with only 2-3 persons in the car. This gives false information about lobby traffic and pulls most or all of the cars to the lobby. I left them disabled.

In conclusion, our most serious problem is still present. The loading car releveling makes the people afraid of the elevator. The car bouncing keeps this fear alive. The multiplex controller still has many problems. We have added many aspirins to relieve the pain, but we have not fixed the broken leg. For example, the new PKT, PK2, and PK1 back contacts send cars to the calls, but cause chasing and bunching. The relay sequence is bad. Two or three relay races cause intermittant actions.

The multiplex controller has complicated circuits that do not work properly. For example, the dispatch interval is shortened when the system is busy. The load switches do not work reliably and are not even furnished unless called for by the job specs. The DST-DOR circuits work intermittantly due to relay sequencing and cause passenger frustrations. The zones tie together when a call is behind the in-zone car. Perhaps, now that the CMC 1200 is used on the deluxe jobs, we can use a simpler, more reliable multiplex controller.

Office - Supreme Court, U.S.
FILED
SEP 30 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-222

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

1616 REMINC LIMITED PARTNERSHIP,
Petitioner,

v.

UNITED STATES ELEVATOR CORPORATION,
Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

H. BRADLEY EVANS, JR.
EVANS, ECONOMOU AND PICKARD, P.C.
122 South Royal Street
Post Office Drawer 267
Alexandria, Virginia 22313
(703) 549-7510

Counsel for Respondent,
United States Elevator Corporation

PARRICK PRESS, WASHINGTON—1001 N. OAK STREET, ARLINGTON, VA 22209—(703) 522-8000

TABLE OF CONTENTS

	Page
Table of Cases and Authorities	(ii)
Supplemental Statement of the Case	1
Opposition to the Writ	
I. THE REQUEST FOR A *DE NOVO* REVIEW COMES TOO LATE AND IS NOT IN CONFLICT WITH THIS COURT'S DECISION IN *NORTHERN PIPELINE CONSTRUCTION CO.* V. *MARATHON PIPE LINE CO*	5
II. THE EXCLUSION OF THE MEMORANDUM WAS HARMLESS ERROR AS THE LOWER COURTS HAVE FOUND	7
III. THE FACTS OF THIS CASE AND ESTABLISHED PRECEDENT MANDATE LIABILITY BY VIRTUE OF THE ASSIGNMENT	8
IV. UNITED STATES ELEVATOR CORPORATION WAS ENTITLED TO PROCEED AS AN UNSECURED CREDITOR	13
Conclusion	16

TABLE OF CASES AND AUTHORITIES

	Page
CASES:	
Allen v. *Lokey*, 307 F. 2d 353 (5th Cir. 1962)	5
Blue Star Nav. Co. v. *Emmon Coal Mining Corp.*, 120 A. 459 (Pa. 1923)	12
Corvallis v. *Portland*, 163 p. 1173 (Or. 1917)	12
Fiberchem, Inc. v. *General Plastics Corporation, et al.*, 495 F. 2d 737 (9th Cir. 1974)	10,11
Gilmer v. *Woodson*, 332 F. 2d 541, 546 (4th Cir. 1964)	5
Gordon v. *United States*, 344 U.S. 414, 73 S. Ct. 369 (1952)	8
In Re Schaefer Co., 103 F. 2d 237 (6th Cir. 1939) cert. den. 308 U.S. 579	5
Lawler, Trustee v. *County of Henrico*, 636 F. 2d 68 (4th Cir. 1980)	13
Northern Pipeline Construction Co. v. *Marathon Pipe Line Co.*, U.S. , 50 USLW 4892, 4900	6,7
Potucek v. *Cordeleria Lourdes*, 310 F. 2d 527 (10th Cir. 1962) cert. den. 372 U.S. 930	5
Rose v. *Vulcan Materials Company*, 194 S.E. 2d 521 (N.C. 1973)	11
United States ex rel White v. *Thompson & Georgeson, Inc.*, 346 F. 2d 865 (9th Cir. 1965)	10
United States v. *Marxen*, 307 U.S. 200 (1939)	13
Wightman v. *Spofford*, 8 N.W. 680 (Io. 1881)	12
AUTHORITIES:	
2A Collier on Bankruptcy, (14th Ed.) §39.28, p 1536..	5
3 Collier on Bankruptcy, (14th Ed.) §57.11(3)	14

	Page
Grismore, *Is the Assignee of a Contract Liable for the Non-Performance of Delegated Duties?* 20 Mich. L. Rev. 284, 289 (1920)	11,12
2A Michie's Jurisprudence, *Assignments*, §29	10
3 Restatement of the Law Second, Contracts, 2d §328 (A.L.I. 1981)	12,13
STATUTES AND RULES:	
Bankruptcy Act, §2a(10), 39(a)8 and 39(c)	5
Bankruptcy Rule 102(b)	6
Bankruptcy Rule 810	5
Virginia Code 8.2-210(4)	11
Virginia Code 43-4	2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

1616 REMINC LIMITED PARTNERSHIP,
Petitioner,

v.

UNITED STATES ELEVATOR CORPORATION,
Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

SUPPLEMENTAL STATEMENT OF THE CASE

Petitioner's statement of the case is considerably truncated and needs elaboration. 1616 Reminc Limited Partnership did indeed file a Chapter XII proceeding under the Bankruptcy Act on August 15, 1975. It continues to remain debtor-in-possession and has operated the Xerox Building in the Rosslyn section of Arlington County, Virginia with considerable success.

Petitioner's brief says: "In accordance with a Plan of Arrangement, Reminc wound up its contractual relationship with Citcon [the general contractor]." (Petitioner's Brief, P. 3). There is nothing in the record to suggest that it had some special arrangement with Citcon or that there were some special terms in the plan of arrangement whereby Citcon was to be treated any differently than any other creditor.

In fact, Citcon was the general contractor whose "umbrella lien" under Virginia law would protect all subcontractors,

including the Respondent, United States Elevator Corporation. (Va. Code 43-4). Citcon's proof of claim and acceptance of Petitioner's plan of arrangement indicated that $1,199,292.03 was due it.[1]

As seen from Reminc's statement of the case, *after* it secured acceptances and confirmation of its Plan of Arrangement, Reminc took an assignment dated almost a year after it instituted these Chapter proceedings. That assignment from Citcon to Petitioner, although worth almost $1,200,000.00, was purchased for approximately $15,000.00 by Petitioner. The assignment and the "buy-out" of the general contractor were post filing occurrences.

Prior to the assignment, in January of 1976, Petitioner filed forty-one "Objections to Claim" against entities who had performed work on its building of whom U.S. Elevator was one. (J.A. 18-20). That Objection to Claim said in part:

> "3 . . According to your debtor's books and records of account, the balance owed to this contractor under its original contract is $109,938.00. . . .
>
> 5. That if all work required under [U.S. Elevator's] original contract is completed in accordance with the terms and specifications of that contract, then your debtor has *no objection* to the above named contractor being paid the amount owed under its original contract." (J.A. 86; emphasis supplied).

Counsel to United States Elevator was unaware that the debtor had in its possession a waiver of mechanic's lien signed by Respondent. (Though not before this Court, it should suffice to say that while U.S. Elevator could not sustain the burden of fraud, it was certainly duped into releasing its mechanic's liens rights in return for what was promised as prompt payment.)

---

[1] All Joint Appendix references are to that appendix used in the United States Court of Appeals for the Fourth Circuit. This specific exhibit is J.A. 139 and 140.

Petitioner's brief says that there was "severely conflicting testimony" on whether the elevators were installed in accordance with contract provisions. It fails to mention that two expert witnesses hired by Reminc testified in favor of U.S. Elevator Corporation. While the facts may have been severely disputed before the trial, at the actual hearing, even Petitioner's witnesses essentially agreed that the elevators were operating properly or admitted writing reports to that effect.

Emphasized in Petitioner's brief is the fact that a Xerox employee testified as to the asserted deficiencies in the elevators' operations. It is notable that Xerox Corporation is the prime tenant of the debtor's building and, as the docket entries reflect, was involved in substantial and long-standing disputes with the debtor. Xerox withheld rent for a considerable period of time. Its employee would hardly be expected to come into Court and say the elevators were working properly when Xerox was alleging construction defects (among which was the elevator system) and withholding rent because of such asserted, multiple defects.

Petitioner really produced no evidence that the elevators were unsatisfactory from anyone other than a Xerox employee and an elevator mechanic employed by a competitor of U.S. Elevator. As the trial Judge's 23-page opinion sets forth, there were two "experts" for the debtor. "[Charles] Calderone indicated [in a letter dated August 26, 1976] that Richard Langelotti, another employee of Syska & Hennessy, had visited the Xerox building in October of 1975 and found the elevator system to be 'in generally good condition' [and] Langelotti's testimony corroborated this testimony." (Trial Court's opinion, App. 28a).

Just before trial, Petitioner decided to take the *de bene esse* deposition of one William Cork who was a former employee of United States Elevator Corporation. Petitioner now suggests that Cork's testimony was "anchoring" its case.

Its direct examination of Cork took less than 55 pages. In some areas, counsel to Petitioner chose to go over the memo's language verbatim. Cork was not even able to identify the memo saying: "This appears to be the copy of my rough draft

but I have no way of knowing if it is." (J.A. 431). Counsel started on the first page of the memorandum saying: "On the first page, first of all, can you explain what you mean in paragraph 2. . . ." (J.A. 437). At the end of the direct examination, he alluded to a quote that was a few sentences from the end of the seven-page memorandum (J.A. 465).

Against this factual backdrop, U.S. Elevator introduced favorable testimony from three elevator experts and another expert's conclusions were received in evidence by way of a written report.[2] That report dated November 10, 1975, indicates that Xerox-the prime tenant-informed him that the shutdowns in the elevator had been reduced and the service had improved. "In conclusion, in my opinion, the elevators are now acceptable with minor exceptions to the basement service and selective doors." (J.A. 185). In addition, Petitioner signed written acceptances of all eight elevators (J.A. 180-1).

The trial judge wrote a 23-page opinion. (App. 7a *et seq.*) Petitioner then noted the same kind of appeal that it had noted on other issues throughout these lengthy proceedings and asked the District Court to review the decision.

The District Court did so and affirmed. *After* the affirmance by the District Court, *long after* it had secured acceptances and approval of its plan of arrangement, this Petitioner then, for the first time before the United States Court of Appeals for the Fourth Circuit, asserted error in that there had not been a *de novo* review. In effect, it belatedly asked for a repetition of the two-day trial held before the Bankruptcy Court.

Other meritless arguments are advanced by Petitioner also and will be dealt with hereafter in the brief.[3]

---

[2] The extensive qualifications of Elevator's lead expert cover 29 pages. (J.A. 189-203).

[3] It is counsel's distinct recollection that the asserted request for a *de novo* review and United States Elevator's treatment as unsecured creditor were not even mentioned at oral argument before the Fourth Circuit.

I.

THE REQUEST FOR A *DE NOVO* REVIEW COMES TOO LATE AND IS NOT IN CONFLICT WITH THIS COURT'S DECISION IN *NORTHERN PIPELINE CONSTRUCTION CO.* V. *MARATHON PIPE LINE CO.*

Petitioner has passed its seventh anniversary as a viable Chapter proceeding and has sought many reviews of the United States Bankruptcy Courts' decisions in the United States District Court for the Eastern District of Virginia. It now suggests that the Honorable Albert V. Bryan, Jr. should have a conducted a *de novo* hearing when no such request was made to him.

While it is true that much weight should be given to a referee's finding of facts based upon conflicting evidence, "... the findings of the referee were held not necessary *conclusive* on the reviewing judge." *2A Collier on Bankruptcy,* (14th Edition) §39.28, p. 1536 (Emphasis in original; citations omitted). As Collier's goes on to point out: "... even though a referee's findings 'should stand unless the judge is fully satisfied that error has been committed,' nevertheless they are reviewable though the review involves discrediting witnesses." *2A Collier, supra, Ibid.* (Footnotes omitted.)

The Fourth Circuit followed it earlier ruling in *Gilmer* v. *Woodson,* 332 F. 2d 541, 546 (4th Cir. 1964): "Where the referee's findings are based upon conflicting evidence, as here, the reviewing court should not disturb such findings unless they are not supported by any substantial evidence or there is most cogent evidence of mistake and micarriage of justice." The cases to that effect are legion. See, e.g., *In Re Schaefer Co.,* 103 F. 2d 237 (6th Cir.1939) *cert. den.* 308 U.S. 579, *Potucek* v. *Cordeleria Lourdes,* 310 F.2d 527 (10th Cir. 1962) *cert. den.* 372 U.S. 930. *Allen* v. *Lokey,* 307 F. 2d 353 (5th Cir. 1962). (There are also more than 40 cases on point cited in 2A Collier's *supra* fn 22, pp. 1536-1537.)

The belated request of Petitioner for a *de novo* review does more than assault Rule 810. It also asks this Court to in effect rewrite the provisions of § 2a(10), § 39a(8) and § 39c of the Bankruptcy Act.

Reminc pursued its appeal to the District Court pursuant to Rule 810 and availed itself of all of the rights accorded it under the 800 series rules. At this late date, it is suggested that Judge Bryan should have *sua sponte* ordered a *de novo* hearing for which no request was ever made.

In the Fourth Circuit, Petitioner assigned as one of its errors: "Reminc was entitled to *de novo* review by an Article III Judge." Before this Court, Petitioner now seems to say that the Bankruptcy Act and the appeal procedures followed by it are unconstitutional. It then suggests that because of Rule 810 it had no other means by which to seek a trial before the United States District Court.

The latter position is incorrect. Rule 102(b) says: "The District Court may, at any time, for the convenience of the parties or other cause, withdraw a case *in whole or in part from a referee* and either act himself or assign the case. . . ." Of course, this Petitioner never asked for such relief and never asked to have the case heard before the U.S. District Judge.[4] Petitioner surely can't be suggesting that it can have two trials before two triers of fact.

Apparently Petitioner supposes that the requested trial before the District Court would yield a different result. This Petitioner has had one bite at the evidentiary apple and now belatedly seeks a second one.

The method of review utilized in this case and the *Marathon Pipe Line* decision are not incompatible. The *Marathon* decision held that the authority of the new Bankruptcy Judge was improperly circumscribed but implicitly approved the earlier system under the "old" Bankruptcy Act.[5]

---

[4] On March 15, 1976, U.S. Elevator filed an application to lift the stay so it could proceed in State Court or, in the alternative, for reference to a special master (J.A. 24). Apparently the debtor objected as the matter was taken under advisement (J.A. 25, March 19, 1976 docket entry). Had the debtor joined in that request, the case would have been heard in a Virginia State Court of record.

[5] "But this Court has sustained the use of adjunct fact-finders even in the adjudication of constitutional rights—so long as these adjuncts were subjected

(footnote continues)

Reminc sought the rulings and protection of the referee without reservation. It is only after it lost the trial and the first appeal that it has complained. The complaint is meritless and fatally late.

II.

THE EXCLUSION OF THE MEMORANDUM WAS HARMLESS ERROR AS THE LOWER COURTS HAVE FOUND.

The author of the questioned memorandum was one Lawrence W. Cork who was deposed *de bene esse* in California on January 23, 1980, shortly before trial. He testified that his duties were to "service elevators, answer trouble calls and adjust new installations." (J.A. 413). He styled himself an "elevator mechanic" (J.A., *Ibid.*) and his education was through high school (J.A. 418). He had taken no formal courses in elevator operation (J.A. 420). He never signed his draft memo and never reviewed it but said "this appears to be the copy of my rough draft but I have no way of knowing if it is." (J.A. 431.).

Petitioner's objection seems to be that the memo itself was not introduced into evidence. In view of its technical nature, it would need extensive explanation and standing alone would have little utility. Presumably for that reason, counsel to Petitioner went over in some detail the wording of the memorandum and questioned Mr. Cork in connection with its contents. The deposition was not so lengthy as to preclude counsel from going through it line by line if he felt it advisable. No motion was ever made in the course of the *de bene esse* deposition to move the memo into evidence.

(footnote continued)

to sufficient control by an Art. III district court." *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, _____ U.S. _____, 50 USLW 4892, 4900.

Counsel elected then not to go into it in any more detail but effectively covered the major points in all events. Clearly, the substance of the questioned exhibit was before the trier of fact.

Petitioner's sole reliance on *Gordon* v. *United States*, 344 U.S. 414, 73 S. Ct. 369 (1952) is misplaced. That case is totally inappropriate for the issue at hand in this case.

Gordon was a criminal case in which an accomplice named Marshall was granted a plea bargain and testified against Gordon and others. "On cross-examination, Marshall admitted that between his apprehension and his final statement to the Government, which implicated petitioners, he had made three or four [other] statements which did not." 73 S. Ct. 372. Petitioners in *Gordon* moved the trial Judge to order the Government to produce those earlier statements which request was denied. In addition, the petitioner was not allowed to impeach Marshall on the issue of promises supposedly made to him by a District Court Judge if he cooperated. Hence, not only was petitioner denied access to the statements, but he was also denied the right to utilize them at trial.

Here Petitioner not only had the memorandum in its possession but also had an unfettered right to elicit testimony regarding its contents. If its entire contents were not before the trier of fact, it is either because counsel failed to adequately explore the memo at deposition or that it is only *after* the trial that Petitioner felt the memo was crucial.

The overwhelming weight of all the testimony mandated a decision in United States Elevator's favor. The three lower Courts have so ruled. The refusal to admit into evidence the memorandum itself was harmless error.

III.

THE FACTS OF THIS CASE AND ESTABLISHED PRECEDENT MANDATE LIABILITY BY VIRTUE OF THE ASSIGNMENT.

When an assignee unwittingly blunders into an assignment which could impose liability upon him, he may choose not to

accept the benefits and thereby free himself of liability. Alternatively, he can continue to press the claim of his assignor and take with it the liabilities as well as the benefits.

The usual assignment situation is as follows: assignor owes assignee money but can not pay. Assignor then assigns its rights against a third party to assignee, the latter hoping that its debt will be satisfied by a different obligor. In that simple commercial situation the assignee assumes no duties because it is enforcing an *executed* contract without notice of the third party's claims. Here Reminc knew of the claim, listed United States Elevator as a disputed creditor and filed an objection to Elevator's claim *prior* to the assignment.

The instant situation further distorts the normal assignment arrangement. As assignor, Citcon's proof of claim shows the assignee (Reminc) actually owed money to the assignor (Citcon) instead of the usual, opposite situation. (J.A. 139-140) Reminc paid Citcon, as assignor, and thereby assertedly obtained its $1,500,000.00 counterclaim right for which it had paid $15,000.00. In addition, it says it escapes the liability of Citcon to United States Elevator by so doing, even though it secured acceptance of its plan of arrangement never mentioning what is now asserted to be a complete defense to *all* subcontractors' claims.

If this procedure is allowed—particularly in a court of equity—the courts will be beseiged with cases where contested claims are assigned by an assignor that then goes out of business *as did Citcon* (See J.A. 215-220). The assignee (with perhaps the same principals) but now operating as a new legal entity then pursues the contested claim immune from any exposure to the third party. The assignment has thereby created a situation where its heads assignee wins and tails assignee does not lose. If Petitioner's theory is accepted, the assignment deprives one of the original parties to the contract of all rights to recover affirmatively and allows it only to defend and hope for a verdict in its favor. In these unusual factual circumstances the law places an affirmative obligation upon Reminc as all the lower courts found.

Petitioner seems to rely primarily upon the case of *United States ex rel White* v. *Thompson & Georgeson, Inc.* 346 F2d 865 (9th Cir. 1965). In *White* the District Court's allowance of an affirmative recovery *against* the assignee in favor of the third party was affirmed. This is precisely the relief awarded to United States Elevator by the Courts below. The 9th Circuit said: "White is suing as the assignee of Dunbar [the assignor], and as such stands in Dunbar's shoes." 346 F. 2d at 869. Virginia has adopted the same salutory rule: "An assignee steps into the shoes of the assignor and takes the assignment subject to all *prior equities* between previous parties and his situation is no better than that of the assignor." 2A Michie's Juris., *Assignments* §29. (Emphasis supplied).

Reminc insists it "only" purchased a right. What kind of right is it? A contractual right which is determined from reading the contract of the parties. Succinctly, it is an assignment of rights which have been conferred by contract. Reminc apparently is suggesting it purchased only a naked cause of action. It did so for nothing more than nominal consideration (when compared to the asserted value of the claim) and thus it is either champertous or totally inequitable.

Since equity will consider as done that which ought to be done, equity has the power to assume that Reminc received something more than the power to sue. To do otherwise would be to allow Reminc to benefit from its own inequitable behavior.

Reminc also asserts that United States Elevator Corporation is entitled to prove the balance due it under its contract only for the purpose of taking a deduction against the claims of Reminc. In other words, it is contended that by taking an assignment, Reminc has only affirmative rights against United States Elevator Corporation but no responsibility to complete performance under the contract assigned by making payments.

The case of *Fiberchem, Inc.* v. *General Plastics Corporation*, 495 F. 2d 737 (9th Cir. 1974) is precisely in point here. The plaintiff, Fiberchem, held an exclusive sales agreement with General Plastics "... a now defunct manufacturer." 495 F. 2d at 737. Fiberchem sued Rowland for commissions on sales

by Rowland "... after Rowland had purchased from General certain assets including General's purchase orders." *Id.* at 738. Rowland, as assignee, claimed to have purchased only selected assets and "... expressly refused to become obligated to pay sales commissions to Fiberchem on these orders." *Ibid.* General had since filed for bankruptcy. The Court noted that Fiberchem, the plaintiff, was not a party to the dealings between General and Rowland and held that "... in spite of Rowland's disclaimer, because Rowland knew of the sales-commission agreement, it could not purchase the order file free from its inherent liabilities—the obligation to pay sales commissions." *Ibid.*

In *Rose* v. *Vulcan Materials Company,* 194 S.E. 2d 521 (N.C. 1973), the Supreme Court of North Carolina examined the instant question at length. In giving a ruling which favors United States Elevator Corporation, that Court said: "We therefore adopt the Restatement Rule and expressly hold that the assignee under a general assignment of an executory bilateral contract, in the absence of circumstances showing a contrary intention, becomes the *delegatee of his assignor's duties* and impliedly promises his assignor that he will perform such duties." 194 S.E. 2d at 534 (Emphasis added.) This case also quoted from a Law Review article by Professor Grismore which said: "It is submitted that the acceptance of an assignment in this form does *presumptively import* a tacit promise on the part of the assignee to assume the burdens of the contract, and that this presumption should prevail in the absence of the *clear* showing of a contrary intention...[because] it purports to transfer the contract as a whole, and since the contract is made up of both benefits and burdens, *both* must be intended to be included." *(Ibid.,* emphasis supplied). The North Carolina Court went on to note that the Uniform Commercial Code provides that an assignment of a contract in general terms is a delegation of performance of the duties of the assignor citing the equivalent of Virginia Code 8.2-210(4). In so noting, they said: "Our holding in this case maintains a desirable uniformity in the field of contract liability." *Ibid.*

As noted above, the *Vulcan* opinion, *supra*, cites Professor Grismore as an authority in this field. Reminc's brief in the Fourth Circuit also relied on him. Professor Grismore also has said:

> "Moreover common sense tells us that the assignor, after making such an assignment, usually regards himself as no longer a party to the contract. He does not and, from the nature of things, cannot easily keep in touch with what is being done in order properly to protect his interests if he alone is to be liable for non-performance. Not infrequently the assignor makes an assignment because he is unable to perform further or because he intends to disable himself for further performance."

Grismore, *Is the Assignee of a Contract Liable for the Non-Performance of Delegated Duties?* 20 Mich. L. Rev. 284, 289 (1920).

Those common sense arguments are applicable here. Older case law also supports United States Elevator's position. See, e.g., *Wightman* v. *Spofford*, 8 N.W. 680 (Io. 1881), *Corvallis* v. *Portland*, 163 p. 1173 (Or. 1917) and *Blue Star Nav. Co.* v. *Emmon Coal Mining Corp.*, 120 A. 459 (Pa. 1923).

Section 328 of the Restatement of Contracts (2d) totally dispels any notion that United States Elevator has to prove the intentions of Citcon and Reminc when they entered into their post-filing assignment. It also supports the position of United States Elevator that there was a delegation of unperformed duties to Reminc:

> "(1) Unless the language or the circumstances indicate the contrary, as in an assignment for security, an assignment of 'the contract' or of 'all my rights under the contract' or *an assignment in similar general terms* is an assignment of the assignor's rights and a *delegation of his unperformed duties* under the contract.
>
> (2) Unless the language or the circumstances indicate the contrary, the acceptance by an assignee of

> such an assignment operates as a promise to the assignor to perform the assignor's unperformed duties, and the obligor of the assigned rights is an *intended beneficiary* of the promise." *3 Restatement of the Law Second,* Contracts 2d § 328 (A.L.I. 1981) (Emphasis supplied.)

The Restatement and the case law support the findings of the Courts below and correctly imposed liability on Reminc. Petitioner has cited no cases with similar facts to the contrary.

IV.

UNITED STATES ELEVATOR CORPORATION WAS ENTITLED TO PROCEED AS AN UNSECURED CREDITOR.

Reminc relies on *United States* v. *Marxen,* 307 U.S. 200 (1939) on this issue. Simply stated, *Marxen* said the Government was not entitled to proceed as a priority claimant (as its original proof of claim was styled) but was entitled to participate as a general unsecured creditor. United States Elevator Corporation is seeking the same type of result.

In a similar situation, the Fourth Circuit recently upheld the same principle. In *Lawler, Trustee* v. *County of Henrico,* 636 F. 2d 68 (4th Cir. 1980), the County filed a proof of claim as a priority, tax creditor. The Bankruptcy Court disallowed it as a priority claim but allowed it in full as general and unsecured. In affirming that decision, it was noted: "Since even an ordinary lien creditor, deprived of realizing on his security, may pursue his debt by filing as a general creditor, we can discern no unique inequity or unfairness to other general estate creditors by permitting the County's claim to be filed as such." 636 F. 2d at 70.

The plan of arrangement provided a 100% payout to all creditors whose claims were allowed. Reminc has used the Court's services for over seven years to rehabilitate itself. That rehabilitation is not solely debtor oriented. The purpose of the Act is also to see that the creditors are paid.

Amendments to claims are liberally allowed. As *3 Collier on Bankruptcy* (14th Edition) §57.11(3) points out: "It is well settled that if there is upon the record in the bankruptcy proceeding, within the six months prescribed by §57(n), *anything* sufficient to show the existence, nature and amount of a claim, it may be amended even after the expiration of the period." (Emphasis supplied.) Footnote twenty-five to that Section points out:

> "In other words, there must be in the record the substance of that which is asked for. The right to amend can go no further than to bring forward and make effective that which in *some shape* was asserted in the original claim." (Emphasis supplied; citations omitted.)

Other hearings before both District and Bankruptcy Courts dealt with the issue of the validity of Elevator's waiver of mechanic's lien upon which the debtor ultimately prevailed. While United States Elevator could not establish legal fraud, the facts certainly supported a conclusion that it was duped into executing and delivering to Citcon Corporation (the general contractor-assignor), a waiver of its right to mechanic's lien. Simply put, United States Elevator Corporation simply deleted the word "priority" from its proof of claim and made it an unsecured claim.[6]

Petitioner complains that the change in the classification of U.S Elevator's claim was after the fact of filing. Although the petition was filed in August of 1975 and the plan was confirmed in May of 1976, the debtor says it is allowed to proceed on an assignment dated August 6, 1976, which did not even exist when either of those two events occurred. United States Elevator Corporation never changed the nature of its claim against the debtor; the only thing it did was change its priority mechanic's lien status to that of a general unsecured creditor. This case has always been an elevator contract case.

---

[6] Mechanics lien and contractual remedies are cumulative in Virginia. (See Trial Court's opinion, App. 13a.)

In an "Objection to Claim" filed in late January of 1976, the debtor claimed in paragraph three that "according to your debtor's books and records of account the balance owed to this subcontractor under its original contract is $109,938.00." In paragraph five of the same document Reminc said:

> "That, if all work required under [U.S. Elevator's] original contract is completed in accordance with the terms and specifications of that contract, then your debtor has *no objection* to the above named contractor being paid the amount owed under its original contract." (Emphasis supplied; J.A. 86.)

The objection did *not* say it would pay if U.S. Elevator had not waived its mechanic's lien rights. It did *not* say Elevator could recover only if it could establish the proposed efficacy of the assignment. It *did* say if the work was completed, Petitioner would pay. United States Elevator has satisfied that burden in three courts below.

The record is silent as to whether Citcon, the general contractor, also executed a waiver of its lien rights. If not, it could have protected all subcontractors. It *is* clear that its original proof of claim was for $1,199,292.03 (See J.A. 139-140) and that it was bought out by the debtor for about $15,000.00. The assignment and the "buy out" of the general contractor were both post filing occurrences. These events are said to have no impact on United States Elevator's claim except in a negative way. The debtor asserts that it can do what it wants post filing and take only the benefits from those actions. Its position is contrary to equity and common sense.

CONCLUSION

There are no "special and important reasons" for this Court to grant certiorari under Rule 17. There is no conflict between the Circuit Courts or other State Courts of last resort. There is no important federal question to be resolved. Petitioner has had the benefit of two, studied appellate reviews. That is enough.

This Court is respectfully requested to deny the Petition for a Writ of Certiorari and award U.S. Elevator its costs.

Respectfully submitted,

H. BRADLEY EVANS, JR.
EVANS, ECONOMOU & PICKARD, P.C.
122 South Royal Street
Post Office Drawer 267
Alexandria, Virginia 22313
(703) 549-7510

Counsel to Respondent,
United States Elevator Corporation